



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Summer 2016 Vol. 5, No. 4 General Editor Lynne Liberato Executive Editor David Furlow

Columns

Immediate Past President's Farewell

By Ben L. Mesches

Working on behalf of the Society has been one of the most fulfilling professional experiences of my legal career. [Read more...](#)



Ben L. Mesches

Message from the Incoming President

By Macey Reasoner Stokes

In my first message, I would like to tell you about some of the exciting projects that the Society has planned for the coming year. [Read more...](#)



Macey Reasoner Stokes

Executive Director's Page

By Pat Nester

The director of the Medina County Museum noted my connection to the Society. "Oh, so you might be interested in legal documents?" he said. [Read more...](#)



Pat Nester

Fellows Column

By David J. Beck

At the SBOT Annual Meeting the Fellows hosted a reenactment of *Johnson v. Darr*, argued to the 1925 All-Woman Texas Supreme Court. [Read more...](#)



David J. Beck

Executive Editor's Page

By David A. Furlow

In this issue, the *Journal* examines the governing rules of law and how they change. [Read more...](#)



David A. Furlow

Lead Articles

Clearing the Docket

By Chief Justice Nathan L. Hecht

Last year, the Texas Supreme Court decided all argued cases before the end of June. I am fairly certain this had not been done in any other year since 1945. [Read more...](#)



Chief Justice Hecht

The American Law Institute: Stating, Restating, and Shaping American Law Since 1923

By Justice Evelyn Keyes

Did the founding of the Institute in 1922, with its mission of synthesizing and rationalizing state law, make any difference to Texas? [Read more...](#)



Justice Keyes

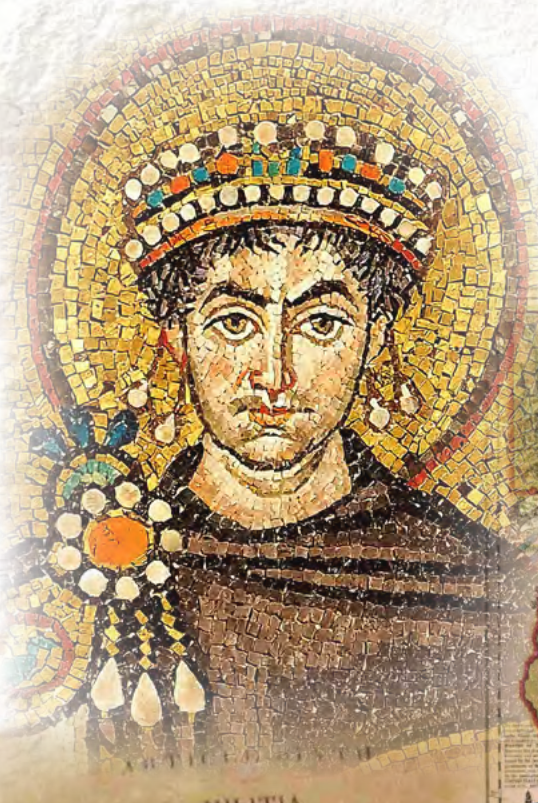
"Justice for All Men": Clarence Borel v. Fibreboard Paper Products Corporation, the Landmark Case in Asbestos Litigation

By Robert J. Robertson and Robert Q. Keith

The *Borel* case was the first litigation in the U.S. to test the application of Section 402A of the Restatement of the Law of Torts (Second) (1965) to asbestos materials. [Read more...](#)



Plaintiff Clarence Borel



MILITIA.
The Legislature shall provide by law for
and disciplining the militia of this State, in such
shall deem expedient, not incompatible with the
and laws of the United States in relation thereto.
2. Any person who conscientiously scruples
shall not be compelled to do so, but shall pay an
personal service.
3. No licensed minister of the Gospel shall be
military duty, work on roads, or serve on

[A Brief History of the Texas Supreme Court Clerk's Office](#)

By Tiffany S. Gilman and Blake Hawthorne

The Clerks of the Texas Supreme Court have come from many backgrounds, and in a way their history reflects the history of our state. [Read more...](#)

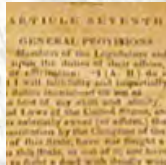


The Court's first Clerk, William Fairfax Gray

[The Evidence Playbook](#)

By Rachel Hooper

A clear playbook is essential because it allows litigants the opportunity to become familiar with the rules. [Read more...](#)



From Peter Gray's *Laws of Texas*

[Theodora Hemphill's Guide to the Texas Constitution, Part IV](#)

By David A. Furlow

The story of the older daughter of Texas Supreme Court Chief Justice John Hemphill and the Texas Constitution reaches its final chapter. [Read more...](#)



Theodora's father, Chief Justice John Hemphill

Book Reviews

[Book Review: Edmund J. Davis: Civil War General, Republican Leader.](#)

[Reconstruction Governor](#)

By Patrick Judd

Carl H. Moneyhon has written a near definitive account of one of the most maligned and reviled political personalities in Texas history. [Read more...](#)

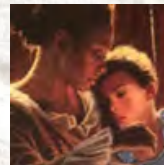


Edmund J. Davis

[Andrea White's Book Emeline Tells a Wonderful Story](#)

By Laura Gibson

Enjoy this telling of Texas Supreme Court Justice Peter Gray's pro bono representation of Emeline, a free woman of color Gray freed from slavery's bonds. [Read more...](#)



Emeline and her son as illustrated by Dan Burr

[Texas's Constitutional History Begins Not in 1836 But in 1824](#)

[A review of Manuel González Oropeza's and Jesús Francisco de la Teja's *Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827*](#)

By David A. Furlow

This two-volume treatise provides historians, attorneys, jurists, and the public with primary records, secondary authorities, and in-depth analysis of the Constituent Convention. [Read more...](#)



News & Announcements

[In Memoriam:](#)

[Karen R. Johnson, 1944-2016](#)

The former President of the Texas Supreme Court Historical Society's Board of Trustees died at her home in Austin on June 5. [Read more...](#)



Karen R. Johnson

[Former U.S. Solicitor General Paul Clement Will Keynote Hemphill Dinner](#)

The Honorable Paul Clement will be the principal speaker at the Society's 21st Annual John Hemphill Dinner on Friday, September 9th. [Read more...](#)



Hon. Paul Clement

[All-Woman Court Ruled the State Bar Annual Meeting](#)

By David A. Furlow

The Society's reenactment of oral argument before the 1925 All-Woman Texas Supreme Court was the hit of the 2016 State Bar Annual Meeting. [Read more...](#)



The All-Woman Court reenactors

[DAR Honors Judge Mark Davidson's Preservation of Texas's Courthouse History](#)

By David A. Furlow

The National Society of the DAR recognized Judge Davidson's lifelong contributions to the preservation of Texas's unique legal heritage. [Read more...](#)



Judge Davidson at the DAR conference



[Justice Bob Gammage's Son Sworn-In to the Bar](#)

The late Texas Supreme Court Justice Bob Gammage's son Sam recently became a member of the Texas bar. [Read more...](#)



Sam Gammage

[Miranda: More than Words—the Fiftieth Anniversary of the Ruling in Miranda v. State of Arizona](#)

By Carmen Roe

The Houston Bar Association's 2016 Law Day event served to remind us that few, if any, Supreme Court decisions are as important to us as *Miranda*. [Read more...](#)



Reenactment of oral arguments for HBA's Law Day

[HBA President Gibson Recognizes Teach Texas Committee Leaders](#)

At the HBA's Annual Meeting in May, outgoing president Laura Gibson presented the President's Award to the four leaders of the organization's Teach Texas Committee. [Read more...](#)



Laura Gibson at the event

[Houston Bar Receives State Bar's Star of Achievement Award for Teach Texas](#)

By Lynne Liberato

Outgoing HBA president Laura Gibson accepted the 2016 Star of Achievement Award for Teach Texas from the State Bar of Texas at its annual meeting. [Read more...](#)



The Taming Texas book cover

[Barbarians Rising: Interview with David Furlow](#)

By TSCHS Journal Staff

In June, the History Channel aired an eight-hour documentary, *Barbarians Rising*, with commentary by TSCHS Board member and *Journal* Executive Editor David Furlow. [Read more...](#)



Barbarians Rising graphic

Membership & More

[Calendar of Events](#)

[Officers, Trustees & Court Liaison](#)

[2016-17 New Member List](#)

[Join the Society](#)

Visit the Society on Twitter and Facebook!



@SCOTXHISTSOCY



FB: Texas Supreme Court Historical Society

© 2016 Texas Supreme Court Historical Society





Ben L. Mesches

Immediate Past President's *Farewell*

My term as President of the Texas Supreme Court Historical Society has recently come to an end, but fortunately that does not mean my time with the organization will. Working on behalf of the Society, with our talented and dedicated staff, and alongside an energetic and creative board has been one of the most fulfilling professional experiences in my legal career. I thank you all for the opportunity to have played a role in the continued growth of the Society.

I thought I would use this brief “farewell” to talk about what we have all achieved together in the last year.

Membership. Our membership efforts have been energized, and our ranks continue to grow.

Strategic Planning. Under the leadership of Warren Harris, we have embarked on a long-term strategic plan that will sustain the organization in the years to come.

Publications and Online Communications. Our unsurpassed *Journal* continues to shine, and our enhanced social media presence is gaining strength.

Fellows Program and the Launch of the Taming Texas Program. Seizing on an opportunity to advance a core mission in educating the public on the state court system, our Taming Texas project has launched, already benefitting more than 9,000 seventh graders at Houston-area middle schools.

Hemphill Dinner. We look forward to another successful Hemphill Dinner in September, which will support investments in the Society's core mission in the years to come.

I can't end this column without thanking our tremendous staff: Executive Director Pat Nester; Consulting Editor Marilyn P. Duncan; and Administrative Coordinator Mary Sue Miller. The Society is in great hands, and I am certain—under Macey Stokes's strong leadership—it will continue to thrive in the year ahead. I look forward to seeing you all at the Hemphill Dinner in September.

BEN L. MESCHES is a partner with Haynes and Boone, LLP in Dallas, where he co-chairs the firm's litigation department.

[Return to Journal Index](#)



Macey Reasoner
Stokes

Message from the *Incoming President*

I am honored to serve as the Society's President for 2016–17. Thanks to the hard work of my predecessor, Ben Mesches, we are well positioned to continue fulfilling our mission to preserve the Court's history and educate the public about that history. In my first message as President, I would like to tell you about some of the exciting projects that the Society has planned for the coming year.

Our year started off with a bang, with the very well-received Reenactment of Oral Argument before the All-Woman Texas Supreme Court, held June 16 at the State Bar Annual Meeting in Fort Worth. This was a reenactment of the legendary 1925 oral argument in *Johnson v. Darr*, known as the "Woodmen of the World" case, when all three male justices of the Court had to recuse themselves and Governor Pat Neff appointed three women to hear the case. David Furlow, Warren Harris, and Lynne Liberato planned this entertaining and informative program. We appreciate our participants, Chief Justice Nathan Hecht, Justices Debra Lehrmann and Eva Guzman, Fifth Circuit Judge Jennifer Walker Elrod, former Justice David Keltner, and Doug Alexander for volunteering their time.

Our next event will be the 21st Annual John Hemphill Dinner, to be held Friday, September 9 at 6:30 p.m. at the Four Seasons Hotel in Austin. Our keynote speaker is Paul Clement, former Solicitor General of the United States and an engaging speaker. We are grateful to all our law firm sponsors, without which the dinner would not be possible.

At 8:30 a.m. on Saturday, September 10, we will host our annual breakfast for former briefing attorneys of the Court and the Justices of the Court at the Texas Law Center in Austin, across from the Supreme Court Building.

Next up is a meeting of the Board of Trustees on October 20 in Austin, also at the Texas Law Center. The meeting will be followed by a lunch presentation by Ali James, Curator of the Capitol and Director of Visitor Services at the State Preservation Board since 1991. All members are welcome to attend Ms. James's speech, which promises to be fascinating.

Our Fellows, led by David Beck, continue to provide significant support to the Society. The Fellows fund the Taming Texas book series, which is designed to teach seventh graders about the important role that the judiciary has played in our state history. Following the success of the first book in the series, *Taming Texas: How Law and Order Came to the Lone Star State*, by Jim Haley and Marilyn Duncan, published in January 2016, the Society will publish the second book, *Law*

and the Texas Frontier, in 2017. We are always in need of volunteers for the presentations that we make to teach the book to seventh-grade classes around the state, so please let us know if you would like to participate in one of these one-hour presentations in your city or town. The Taming Texas program would not be possible without Warren Harris, whose efforts will be recognized at the Hemphill Dinner when he receives the second annual President's Award.

Former Chief Justice Thomas R. Phillips is also working on a book on the history of judicial elections in the state. Former Justice Craig Enoch is spearheading the fundraising effort for this book, which will likely be published in 2017–18.

Please remember that the Society provides speakers and CLE credit to bar organizations and other historical societies. Let us know if a bar or historical organization in which you are involved needs speakers.

Finally, I would not be able to do this job without the invaluable assistance of our excellent staff, Pat Nester, Executive Director, Mary Sue Miller, Administrative Coordinator, and Marilyn Duncan, Consulting Editor. Thank you for your support of the Society, and I look forward to serving you as President this year.

MACEY REASONER STOKES *is a partner with Baker Botts LLP in Houston and heads the firm's appellate section.*

[Return to Journal Index](#)



Pat Nester

In Praise of *History's Legal Guardians*

We had driven over to Hondo after a family reunion in Devine the previous day. My brother Rob and nephew Matt wanted to check out the Medina County Museum, if it was open, to see if it could shed any light on the original family settlement that dated from Henri Castro's expedition in the 1840s that brought German and Alsatian immigrants to Texas.

We were too early. The place didn't open until after lunch on Sunday. When we finally got in, we were the only patrons, and the museum director Steve Lapp welcomed us with brisk Texas hospitality, although we later found out he was a transplant from the Northwest who had followed his Texan wife to the promised land.

The exhibits were spread out among several buildings. There was a complete re-creation of an early schoolroom with well-worn desks and little lesson books in German. There were warehouses, one housing the ferocious steam engine that was used in brickmaking, one of the area's industries since the late nineteenth century. The factory in d'Hanis still operates today and has churned out smooth, russet colored bricks for prominent buildings all over the state.

There was a warehouse full of dusty wagons and a variety of worn hand tools that reminded us of the human sweat that went into ordinary life 150 years ago. The main building housed assorted domestic items—a hand-crafted baby crib that cradled several generations,



a raggedy golf bag with wooden-shafted clubs, the ubiquitous display of multiple varieties of barbed wire, the “Devil’s Rope” that eventually tied the state together.

All this was interesting enough though not particularly surprising. It was after our wanderings around the grounds that things started to change. I happened to mention to Mr. Lapp my connection with the Texas Supreme Court Historical Society, and he lit up. “Oh, so you might be interested in legal documents?” he said.

Why, yes we were. There were some puzzles in our family record about just where there original family farmstead was located and how our great granddad Valentine had gotten his land.

I will pause here to ruminate on the mental health of Valentine’s parents, Martin and Regina. After getting down off the ox-drawn wagons with their little band of Europeans that day in 1846, they were raided by Comanches who extended them the courtesy of not killing them. Later, when they went out to their designated parcel of land, they discovered that the spacious new Germany overflowing with milk and honey the empresarios had promised in promotional letters circulating throughout the Fatherland might have been a serious error in translation.

But back to the main tale. With obvious relish, Mr. Lapp marched us back to a far corner of the former railroad terminal that was the main building. Unsnapping a big padlock on a plywood door, he showed us box after box of old legal records—deeds, surveyors’ notes, bills of lading—all the documentary evidence of the free-wheeling pursuit of land and chattels of our ancestors, a glimmering chronicle of the human contentment that might be eked out in a generation or two if everyone worked their hardest.

Sure enough, we found the actual surveyor’s notes, written in pencil, showing the lands of Val Nester. (See picture below.) Putting that together with a modern map of the area that showed the creek running along the edge, we had positive confirmation of where our branch of the family— Val and Regina and their eleven children—blazed their path in the New World.

Surely there are other hidden caches or records squirreled away in corners of county museums and attics throughout Texas. At the spring meeting of the Society held at Baker Botts in Houston, partner Bill Kroger showed us an astonishing collection of documents the firm had accumulated. They had all been professionally preserved and curated and told the tale in careful legal language of a backwater settlement in Mexican Texas that became the mighty Houston megalopolis.

Afflicted as we lawyers are with the need for precision in language and thought in our documents, we have as a by-product of our efforts become the consummate historians of record. It is not the journalists who write the first draft of history; it’s the judges, lawyers, and other professionals who draft documents of legal import. When you run into the Bill Krogers and Steve Lapps who just love showing off their collections, humble or sublime, of dusty legal documents, please salute them. Help support their collections if you can. To borrow from Wordsworth, what is history itself but the documents of countless transactions recollected in tranquility?

Surveyors Plat Book # page

#66
Joe Nester

1983
Pete Saathoff 7/6 x 1/2
4

Swing 84 1/2
Kate Allen 6 1/8

Leue Saathoff 7 1/2 x 1/2
6 1/2

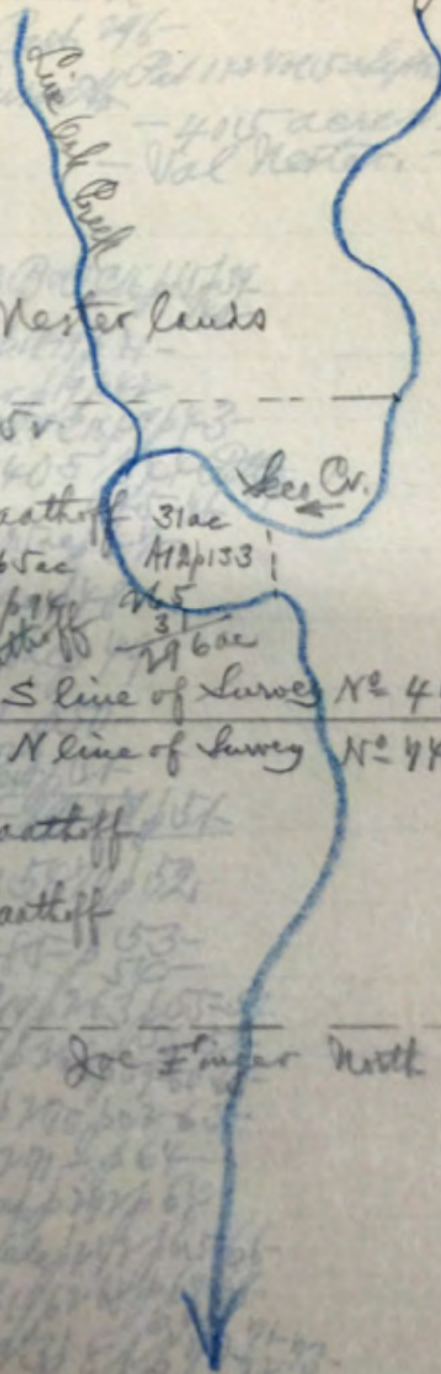
Val Nester lands

1945

9 #1 E Saathoff 31 ac
4 265 ac
50 A10 p 74
SW 1/4 #41 Leue Saathoff 3/15
S line of Survey No 441 296 ac
NW 1/4 #40 N line of Survey No 440

F.E. Saathoff
Leue Saathoff

Joe Finger North line



14 20
15 21
16 22
17 23
18 24
19 25
20 26
21 27
22 28
23 29
24 30
25 31
26 32
27 33
28 34
29 35
30 36
31 37
32 38
33 39
34 40
35 41
36 42
37 43
38 44
39 45
40 46
41 47
42 48
43 49
44 50
45 51
46 52
47 53
48 54
49 55
50 56
51 57
52 58
53 59
54 60
55 61
56 62
57 63
58 64
59 65
60 66
61 67
62 68
63 69
64 70
65 71
66 72
67 73
68 74
69 75
70 76
71 77
72 78
73 79
74 80
75 81
76 82
77 83
78 84
79 85
80 86
81 87
82 88
83 89
84 90
85 91
86 92
87 93
88 94
89 95
90 96
91 97
92 98
93 99
94 100

Fellows Column

By David J. Beck, Chair of the Fellows



Photo by Alexander's Fine Portrait Design-Houston

In June, we presented our third biennial reenactment of the oral argument of a historic case at the State Bar of Texas Annual Meeting in Fort Worth. A large crowd was on hand to watch as the Fellows presented a live reenactment and discussion of *Johnson v. Darr*, the 1925 Woodmen of the World case argued to the All-Woman Texas Supreme Court. Chief Justice Nathan Hecht presided over the program. Fellow Warren Harris gave welcoming remarks, and Fellows David Furlow and Lynne Liberato provided the background and historical overview of the case before the oral argument reenactment.

We were pleased to have a distinguished panel to hear the arguments. Judge Jennifer Elrod of the United States Court of Appeals for the Fifth Circuit presided as Special Chief Justice Hortense Sparks Ward, Justice Eva Guzman sat as Special Justice Hattie L. Henenberg, and Justice Debra Lehrmann sat as Special Justice Ruth Virginia Brazzil. Fellow Doug Alexander argued on behalf of W.F. Johnson and Fellow David Keltner argued on behalf of J.M. Darr. The Fellows owe a special thanks to Blake Hawthorne, Clerk of the Supreme Court of Texas, and Tiffany Gilman, the Court's Archivist, for their work in gathering the historical materials used by the participants in the reenactment.

"It was clear that Keltner and Alexander spent a great deal of time in preparing for the reenactment, like they would for a real oral argument," said Justice Paul Green, the Supreme Court's liaison to the Society. He added, "The audience noticed and appreciated the superb advocacy presented in the case." A full article on the reenactment with photos appears elsewhere in this issue.

Our judicial civics and court history project, *Taming Texas*, continues to expand. The Houston Bar Association is preparing to again teach our first book *Taming Texas: How Law and Order Came to the Lone Star State*, in the classroom in both Fall 2016 and Spring 2017. HBA program co-chairs Justice Brett Busby, Judge Debra Mayfield, and David Furlow are recruiting volunteer attorneys and judges in anticipation of reaching 10,000 seventh-grade students in the Fall. That, of course, will represent a major milestone in our efforts to teach the history and importance of the rule of law in Texas. We appreciate the partnership with the HBA because of the vast resources required to teach this number of students; we could not implement such a large-scale program without the HBA.

Also, earlier this month, Justice Busby made a presentation on Taming Texas to the executive directors of all local bar associations in the state. The reception was enthusiastic, and we anticipate that many of these local bars will implement Taming Texas in their area in Spring 2017. In short, our project is going statewide.

Authors Jim Haley and Marilyn Duncan have completed the manuscript for the *second* book in the Taming Texas series, *Law and the Texas Frontier*, and the book is now in the process of being illustrated. The new book focuses on the development of the law and the courts during the frontier period. I just finished reading the manuscript and this will be another great work. Chief Justice Hecht is currently writing the foreword to the book, which will be published in 2017. You can find a free electronic copy of the first book, *Taming Texas: How Law and Order Came to the Lone Star State*, in iBook, Kindle, and pdf versions on the Society's website dedicated to the project, www.tamingtexas.org.

Finally, I want to express once again our appreciation to the Fellows for their support of programs like our historic oral argument reenactments and our Taming Texas judicial civics and court history project. If you are not currently a Fellow, please consider joining the Fellows and supporting this important work. If you would like more information or want to become a Fellow, please contact the Society office or me.

FELLOWS OF THE SOCIETY

Hemphill Fellows

(\$5,000 or more annually)

David J. Beck* Joseph D. Jamail, Jr.* (Deceased) Richard Warren Mithoff*

Greenhill Fellows

(\$2,500 or more annually)

Stacy and Douglas W. Alexander	Thomas F.A. Hetherington	Hon. Thomas R. Phillips
Marianne M. Auld	Allyson and James C. Ho*	Hon. Jack Pope*
S. Jack Balagia	Jennifer and Richard Hogan, Jr.	Shannon H. Ratliff*
Bob Black	Dee J. Kelly, Jr.*	Robert M. Roach, Jr.*
Elaine Block	David E. Keltner*	Leslie Robnett
E. Leon Carter	Thomas S. Leatherbury	Professor L. Wayne Scott*
Tom A. Cunningham*	Lynne Liberato*	Reagan W. Simpson*
David A. Furlow and	Mike McKool, Jr.*	S. Shawn Stephens*
Lisa Pennington	Ben L. Mesches	Peter S. Wahby
Harry L. Gillam, Jr.	Nick C. Nichols	Hon. Dale Wainwright
Marcy and Sam Greer	Jeffrey L. Oldham	Charles R. Watson, Jr.
William Fred Hagans	Hon. Harriet O'Neill and	R. Paul Yetter*
Lauren and Warren Harris*	Kerry N. Cammack	

*Charter Fellow

[Return to Journal Index](#)



David A. Furlow

The Rules of the *Game*

Rules governing life and law can be controversial. On July 7, 1939, director Jean Renoir premiered a comedy of manners, *Rules of the Game* (*La Règle du jeu*), and a French historical documentary at the palatial Colisée Theatre in Paris for several conservative nationalist societies. Renoir's film showed a world of contending cliques, each with "its customs, its mores, indeed, its own language ... [with] its rules, and these rules determine the game ... in a society in the process of disintegration."¹ Shocked patrons expecting patriotic spectacle booed depictions of upper crust frivolity, adulterous liaisons, and a hunting party gone fatally awry. Fights erupted as nationalists accused Renoir of promoting class warfare. One man tried to burn down the cinema.² "[T]he audience recognized ... themselves," Renoir observed. "People who commit suicide do not care to do it in front of witnesses."³



Rules of the Game poster, Wikimedia.

May 10, 1940, blitzkrieg engulfed the Third Republic. Six weeks later, France surrendered to the Nazis. Less than a year after *Rules of the Game* premiered, harsh new rules of the game came to govern France.

In this issue, the *Journal* examines the governing rules of law and how they change. Learning the rules of the game, and anticipating when and how those rules may change, are important skills in the practice of law



A Frenchman weeps as German soldiers enter Paris, June 16, 1940. French National Archives.

¹ *The Rules of the Game*, DVD, Disk 1 (Criterion Collection, 2004), Special Feature: Jean Renoir's Introduction, DVD notes, 10, and Oliver Curchod's commentary.

² Alexander Sesonske, *Jean Renoir: The French Films, 1924-1939* (Cambridge, Mass.: Harvard University Press, 1980), 384.

³ *Ibid.*

and the administration of justice. The way a tribunal frames the legal issues and applies the governing rules of law often determines the outcome of a case. A good appellate opinion begins by discussing the standard of review because it objectively sets forth the governing rules of law. Clients pay hundreds of dollars an hour to hire the best appellate attorneys: to advise them about which standard(s) of review govern, to apply the governing rules, and to win a case.

Texas Supreme Court Chief Justice Nathan L. Hecht opens this issue with the article, "Clearing the Docket." For the second year in a row, the Texas Supreme Court has cleared its docket—decided every single case—by the end of June. The Chief Justice places the terms, *legal year*, *terms of court*, and *in session*, in their historical context by discussing their origin in medieval England, and analyzing the way they changed in America under the Judiciary Act of 1802, amendments that occurred after the Civil War, the Judicial Code of 1911, and statutes enacted since World War II. Chief Justice Hecht then analyzes those terms under the Texas Constitution as the Lone Star State's courts have evolved during the past two centuries. To understand the Court's success in administering and clearing its docket, you must read this scholarly contribution to the *Journal*.

This issue moves next to Texas First Court of Appeals Justice Evelyn Keyes's article, "The American Law Institute: Stating, Restating, and Shaping American Law since 1923." In this summation of the paper she presented as part of the Society-sponsored panel at the March 2016 Texas State Historical Association Annual Meeting, Justice Keyes describes the origins and operation of America's best-known institution devoted to defining existing American law and suggesting ways it can be reformed.

In "Justice for All Men': *Clarence Borel v. Fibreboard Paper Products Corporation*, the Landmark Case in Asbestos Litigation," another result of the Society's presentation at the 2016 TSHA Annual Meeting, Lamar University History Department Professor Robert Robertson builds on the foundation laid by Justice Keyes's ALI paper. He shows how U.S. District Court Judge Joe Fisher, an LBJ appointee, helped change personal injury and class action law forever by applying ALI's Restatement (Second) of Torts Section 402A (1965) and the Texas Supreme Court's adoption of Section 402A in *McKisson v. Sales Affiliates, Inc.*, 416 S. W. 2d 787, 788-91 (Tex. 1967) to govern asbestos-related personal injury and property claims from Texas to Georgia in *Borel v. Fibreboard*, 493 F. 2d. 1076 (5th Cir. 1973, rhg. denied), *cert. denied*, 439 U. S. 869 (1974). The *McKisson* and *Borel* cases created new rules of the game.

Former prosecutor Rachel Hooper analyzes the history of Texas evidence law in her article, "The Evidence Playbook." She begins the playbook by examining private attorney and later Texas Supreme Court Justice Peter Gray's drafting of the Texas Practice Act and the first Texas Legislature's enactment of it in 1846. She then describes how Texas scholars John Henry Wigmore and Charles McCormick reformed common law evidence in Texas and elsewhere. She concludes by asking how the Texas Supreme Court's Advisory Committee on Rules of Evidence based the Texas Rules of Evidence on federal evidentiary rules as adapted to meet Texas needs.

In "A Brief History of the Texas Supreme Court Clerk's Office," Texas Supreme Court Archivist Tiffany S. Gilman and Texas Supreme Court Clerk Blake Hawthorne describe the history

of an office essential to the orderly administration of justice in Texas. They begin in 1837, when the first Chief Justice of the Republic's Supreme Court, James Collinworth, appointed the first Clerk, William Fairfax Gray. The story continues to the present.

In my own article, "Theodora Hemphill's Guide to the Texas Constitution, Part IV," I show how the changing Texas Constitution and post-Civil War amendments to the U.S. Constitution reshaped the life of Texas Supreme Court Chief Justice John Hemphill's oldest daughter Theodora. Part IV examines the unique way she declared her independence from Texas law during the "Separate but Equal" era of Jim Crow. Theodora's story ends with the U.S. Supreme Court's creation of a constitutional order that allows all citizens to play the games of life and law under equal rules.

As always, this issue of the *Journal* also includes book reviews and other pieces of special interest to our readers. Former Houston Bar Association President Laura Gibson provides an overview of Houston author Andrea White's new book *Emeline*, illustrated by Dan Burr. Austin historian Patrick Judd reviews Carl J. Moneyhon's revisionist book about the much-maligned Reconstruction governor of Texas, Edmund J. Davis. Houston attorney Carmen Roe celebrates the fiftieth anniversary of the U.S. Supreme Court's ruling in *Miranda v. State of Arizona*, 384 U.S. 436 (1966), which requires police officers to tell criminal defendants about their right to remain silent and to obtain the advice of an attorney before speaking with law enforcement officers.

I contribute a review of former Texas State Historian and current Texas State University Professor Frank de la Teja's newly released *Acts of the Constituent Congress of Coahuila and Texas, 1824-1827*. I also cover the Fellows' reenactment of oral argument in the All-Woman Court case, *Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925), with Texas Supreme Court Chief Justice Nathan Hecht and Justices Eva Guzman and Debra Lehrmann, as well as Fifth Circuit Judge Jennifer Elrod, which became the hit of the State Bar Annual Meeting this summer.

All of us on the *Journal* staff hope you enjoy this final issue of our fifth year of publication. We invite you to share your comments about this and previous issues and to consider submitting an article for a future issue. We've only just begun....

[Return to Journal Index](#)

Clearing the Docket

By Chief Justice Nathan L. Hecht

Last year, the Texas Supreme Court decided all argued cases before the end of June. I am fairly certain the Court had not “cleared the docket” by June any other year since 1945, when the number of Justices was increased to nine, and I have not found evidence that it ever did so in the century preceding. This year, again, the Court issued opinions in all pending argued cases by the end of June. I believe this will become the Court’s settled practice. Credit for this accomplishment goes entirely to my colleagues, who committed to the goal and worked hard to achieve it, and to the Court’s excellent staff attorneys, law clerks, and administrative staff. The development is important for several reasons.

Why June? There is a short answer, but first, a little background. Since the Middle Ages, *the legal year* and *terms of court* during which courts are *in session* have been used to measure the progress of cases through the justice system. In England, the legal year has long commenced in October. It is immediately preceded by the Red Mass, a Catholic Church service to invoke upon the judges the blessing of the Righteous Judge, followed by the Lord Chancellor’s breakfast. The

English divided the legal year into four terms with short breaks in between, ending in July, with courts in recess the rest of the summer. Many trial courts, of course, are always open.



The “Judges’ Service,” a modern Red Mass in Westminster Abbey, October 3, 2011. Photo courtesy of the Westminster Abbey Organization.

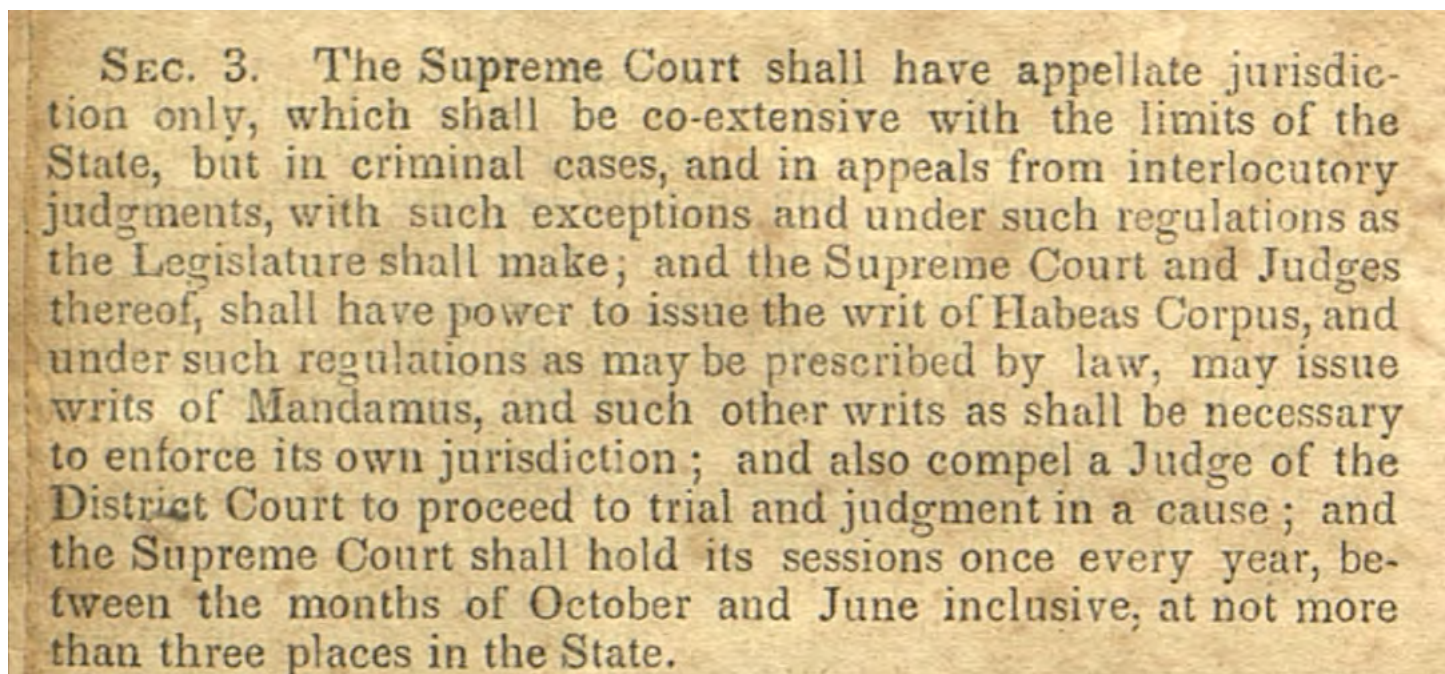
Some of these traditions have been imported with modifications. For the United States Supreme Court, the Judiciary Act of 1802 prescribed a single annual session beginning the first Monday in February.¹ Amendments in 1866 called for an annual term with adjourned or special terms as necessary but did not mention a start date.² Amendments in 1869

¹ Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

² Act of July 23, 1866, ch. 210, 14 Stat. 209.

did not mention terms at all.³ The Judicial Code of 1911, the first complete codification of statutes relating to the federal judiciary, called for one term annually beginning on the second Monday in October, along with additional or special terms.⁴ Since 1945, federal law has required that the U.S. Supreme Court's term commence each year on the first Monday in October and end the Sunday before that day the following year.⁵ And a Red Mass is conducted that Sunday.

Texas Supreme Court terms have always been prescribed by the Texas Constitution except for the brief period between 1869 and 1876. The 1845 Constitution required the Court to "hold its sessions once every year, between the months of October and June."⁶ The Constitutions of 1866 (in effect until 1869) and 1876 required the Court to "sit for the transaction of business from the first Monday of October until the last Saturday of June of every year."⁷ This provision was viewed as foreclosing most official action (except on extraordinary writs) from the end of a term to the beginning of the next,⁸ and as the Court's workload grew and it fell further behind, the summer sabbatical was abandoned.⁹ In 1930, the Constitution was amended to allow the Court to "sit at any time" and prescribed a calendar-year term.¹⁰ This provision remains in effect.¹¹



Article IV, Section 3 of the Texas Constitution of 1845. Image courtesy of Tarlton Law Library, <https://tarltonapps.law.utexas.edu/constitutions/slider/constitution/texas1845/a4/2>.

³ Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

⁴ Act of Mar. 3, 1911, Pub. L. No. 61-475, § 230, 36 Stat. 1087, 1156.

⁵ See Act of June 25, 1948, Pub. L. No. 80-773, § 2, 62 Stat. 869, 869 (codified at 28 U.S.C. § 2); SUP. CT. R. 3.

⁶ TEX. CONST. art. IV, § 3 (1845).

⁷ TEX. CONST. art. IV, § 3 (1866) (internal commas omitted); TEX. CONST. art. V, § 3 (1876).

⁸ See THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 387-388 (George D. Braden ed., 1977).

⁹ See Robert W. Stayton & M. P. Kennedy, *A Study of Pendency in Texas Civil Litigation*, 23 TEX. L. REV. 311, 316-319 (1945); see also Robert W. Stayton & M. P. Waters, *A Study of Pendency in Texas Civil Litigation: Effect of Personal Vacation and Decision-Day Practice of Supreme Court*, 26 TEX. L. REV. 701, 707-708 (1948).

¹⁰ TEX. CONST. art. V, § 3a (1930).

¹¹ TEX. CONST. art. V, § 5b.

But since 1989, at least, when I joined the Court, the calendar-year term has been inconsequential because the State is on a September 1 fiscal year, and caseload statistics used during the biennial legislative budgeting process are kept on that basis. The important date for viewing annual case filings and dispositions is August 31, not December 31. That date is really the functional end of the Court's term. The Court determined that it should strive to decide all argued cases two months earlier, by the end of June, so that the work to finish up would not be complicated by vacation schedules during the summer. Most importantly—and here, at last, is the short answer—the U.S. Supreme Court has generally observed the June deadline for decades, and the Rehnquist and Roberts Courts have rigidly adhered to it.¹² Each year, the bar and the media expect, and the public is told, that a case argued after the term begins in October will be decided by the end of June. By following the same practice, the Texas Supreme Court has the ready benefit of the same expectation.

When I arrived at the Court, deciding all argued cases by the end of June was impossible because the Court regularly heard oral argument through the end of June. The Court followed a weekly schedule, holding Conference Mondays and Tuesdays, hearing argument in three cases on Wednesdays, and working in chambers the rest of the week. Over the years the Court has moved to a monthly schedule, usually hearing oral arguments in nine cases set on three consecutive days, and discussing them and pending cases and petitions at Conference the following week. The Court also front-loads the arguments in the term, scheduling more in the fall and winter, and usually ending in March. On that schedule, opinions in all argued cases can issue by the end of June.

As the Court transitioned to that schedule in the 1990s, it was Chief Justice Tom Phillips's idea to decide all argued cases by the end of June, as the U.S. Supreme Court did. Chief Justice Phillips was a visionary leader of the Court during a difficult time. Due to his efforts, the Court carried over only seven argued cases from 1998 to 1999. But after that, the Court began to fall behind.

The principal reason, in my view, was the exceptional turnover in the Court's membership in the early 2000s. Since 1845, the Court has had 125 Justices—on average, a new arrival a little over every 16 months. (By comparison, the U.S. Supreme Court has had 112 Justices since 1890—on average, a new arrival about every 24 months.) But from Justice Alberto Gonzales's departure from the Court in December 2000 until Justice Don Willett's arrival in August 2005, the Court got 10 new Justices—on average, one every 5.6 months. The turnover during those 56 months was almost exactly *triple* the historic average. The turnover was so great that in July 2005, after Justice Priscilla Owen left for the U.S. Court of Appeals for the Fifth Circuit, I had served the Court longer than my seven colleagues combined. While the new Justices were invariably well-qualified, bright, and industrious, the turnover was unavoidably disruptive. The Court left 57 argued cases undecided at the end of its term in 2006—almost a full term behind. (In the nearly 11 years since Justice Willett's appointment, the Court has had five new Justices, less than two-thirds the historic rate of turnover.)

Chief Justice Wallace Jefferson, successor to Chief Justice Phillips in 2004 and another strong and brilliant leader for the Court, made it a priority for the Court to catch up. In 2011,

¹² See Linda Greenhouse, *How Not to Be Chief Justice: the Apprenticeship of William H. Rehnquist*, 154 U. Pa. L. Rev. 1365, 1365 (2006).

turnover having decreased, the Court left only four argued cases undecided. Chief Justices Phillips and Jefferson prepared the way for the Court to decide all argued cases at the end of June 2015.

Now the Court adopts in August a schedule for arguments, Conferences, and opinion drafts for the next term—the State’s next fiscal year. The agreed schedule recognizes that not all cases can be resolved in the same amount of time. The issues in some are harder, the record more extensive. Justices may disagree, requiring more discussion, and may change their minds. The schedule accommodates those realities and assures that the June deadline will be in focus throughout the term.

As I said at the beginning, the June deadline has several benefits. Requirements that opinions issue in appellate court cases within a set number of days after submission are unreasonable. They do not take into account the fact that some cases are easier to resolve than others. The June deadline serves rather than blinks that reality. Less difficult cases may be decided months before June. But the deadline provides lawyers, their clients, and the public a reasonable time to expect that all cases argued during the term will be decided. It has worked well for the U.S. Supreme Court for decades.

The June deadline allows the Texas Supreme Court to identify more difficult cases earlier in the term and devote more attention to them. The schedule agreed to at the outset of the term provides a ready measure of how the Court’s work is progressing through the year.

The deadline avoids the difficulties of working on decisions—often the last ones of the term are the hardest—amid the demands and distractions of summer schedules. During the summer months, the Court can devote its attention to voting on petitions and researching issues in cases to be argued the next term, and to its many administrative duties. This work does not require regular Conferences.

I must emphasize this: the first priority of the Court, always and by far, is to get every case right. Efficiency is important, and unnecessary delays should be eliminated. But in adjudicating disputes and rights, haste at any cost to careful consideration and thorough, thoughtful decisions has no place.

I end where I began. My colleagues, together with the Court’s legal and administrative staff, should be commended for their dedication to the Court’s work and to civil justice in Texas. Meeting the June deadline is but one demonstration of that dedication.



NATHAN L. HECHT is the 27th Chief Justice of the Supreme Court of Texas. He has been elected to the Court six times, first in 1988 as a Justice, and most recently in 2014 as Chief Justice. He is the longest-serving Member of the Court in Texas history and the senior Texas appellate judge in active service.

[Return to Journal Index](#)

The American Law Institute: Stating, Restating, and Shaping American Law Since 1923

By Justice Evelyn Keyes¹

Where was Texas law, where was every state's law before there was an American Law Institute? And did the founding of the Institute in 1922, with its mission of synthesizing and rationalizing state law, make any difference to Texas?

Think of where we were when Judge Roy Bean presided over “the law west of the Pecos” in his saloon/home in the town of Langtry, on the Rio Grande in Val Verde County, Texas until his death in 1903. As his monument in Langtry states, “The Judge’s ‘law library’ consisted of a single volume: an 1879 copy of the Revised Statutes of Texas. He seldom consulted it ..., calling instead on his own ideas about the brand of justice which should apply.” And he made all offenses payable by fines, which he pocketed, as the county had no jail—just a mesquite tree where he chained prisoners until they sobered up enough to stand trial. And, beyond that, there were those revised statutes (from 1879) to consult.



Judge Roy Bean, in the center holding a law book, presides over the “Law West of the Pecos” in his saloon/courthouse *The Jersey Lilly* in 1900.

Photo available through the National Archives and Records Administration, ARC Identifier 530985.

¹ I wish to thank David A. Furlow for the opportunity to deliver this paper at the Texas State Historical Association's Annual Meeting, March 3, 2016, and for putting together the PowerPoint presentation. I have also drawn on some of the background material presented by co-panelist and Lamar University Professor Robert B. Robertson in his paper “Justice for All Men” and on American Law Institute publications.

Maybe Judge Bean knew something about law in the Texas Constitution of 1876, the Anglo-American common law followed in the state courts, and even the Spanish law which preceded the State of Texas's legal system and in many ways shaped it. And there were better-organized state courts than that in Val Verde County dispensing justice through trial courts, appellate courts, and the Texas Supreme Court. By the time Judge Bean presided over the Law West of the Pecos, the Texas Supreme Court had been functioning as such since 1840, Texas's court system had been functioning in its still presently constituted form since 1876, and the decisions of Texas state appellate courts—and those of state courts across the country—had been recorded in West Publishing's regional state law reporters with their topic and key number system since the 1870s. In Texas, as across the country, the reported law was burgeoning. It was also becoming less clear and authoritative. And there was no system to bring order to it.

By the early twentieth century, leading lawyers, judges, and scholars recognized that American law needed greater clarity. Not only were there disagreements about important principles of Anglo-American common law, but there were many local variations of that law.

To devise a solution to that problem and to improve the law, a committee of the Association of American Law Schools was appointed in December 1920 "To Form a Juristic Center or Institute of Law." The organizers and founders of the ALI present at that meeting included nationally recognized law professors and scholars William Draper Lewis, Dean of the University of Pennsylvania Law School, Secretary; Joseph H. Beale, Harvard Law School, Chairman; Henry M. Bates, Dean of the Law School of the University of Michigan; Ernst Freund, Law School of the University of Chicago; Frederick Green, Law School of the University of Illinois; Edmund M. Morgan, Yale Law School; Harlan F. Stone, Dean of the Law School of Columbia University; and James P. Hall, Dean of the Law School of the University of Chicago, the new President of the Association.

Subsequently, the Committee on the Establishment of a Permanent Organization for the Improvement of the Law was established on May 10, 1922. Besides the original organizers and founders, prominent members of the committee included Elihu Root, the first Honorary President of the ALI; Samuel Williston of the Harvard Law School; Judge Learned Hand; and Roscoe Pound, Dean of the Harvard Law School.

The American Law Institute (ALI) was incorporated on February 23, 1923. Its mission statement described its mission to be then, as it is today:

- to promote the clarification and simplification of the law and its better adaptation to social needs,
- to secure the better administration of justice, and
- to encourage and carry on scholarly and scientific legal work.

The governing body of the ALI is the ALI Council, which acts as a board of directors. The Council consists of no fewer than 42 and no more than 65 members chosen from the ALI's ranks of lawyers, judges, and academics to represent a broad range of institutions, specializations,



1924 Annual Meeting of The American Law Institute

American Law Institute, "Creation," <https://www.ali.org/about-ali/creation>



The American Law Institute Headquarters is in Philadelphia. Photo from Wikimedia.



THE AMERICAN LAW INSTITUTE

and experiences. The Council generally meets in May, October, and January.²

The membership of the organization is limited to 3,000 judges, lawyers, and legal scholars from a wide range of practice areas and from all areas of the United States and some foreign countries. The total membership of 4,200 persons includes ex officio and life members. Membership is by election, with nominations to the membership being made by recommendation of members of the ALI, with

seconding letters. Nominations are screened by the Council and approved by the Council and the membership.

ALI members agree to actively support the Institute's work, to attend the annual meetings, and to participate in ALI projects as members of Members Consultative Groups and also as appointed advisors on ALI projects in which they have particular expertise. All members are expected to write, speak, and vote on the basis of their best professional understanding of the law, without regard to client interests or personal bias, to maintain ALI's reputation for thoughtful and impartial analysis.

Texas's representation in ALI includes, in addition to the Council Officers mentioned above, most Texas Supreme Court justices, a number of Advisors and Consultants who give time to ALI projects, and at least one Project Reporter—Dean Ward Farnsworth, Reporter for the current Project on the Restatement of Torts on Economic Harm.

The principal work of the ALI is, indeed, to prepare restatements of the law. The Restatement mission is straightforward:

- to clarify American law by focusing on general principles;
- to summarize and codify case law reflecting judicial doctrines that evolve over time through application of the principle of stare decisis; and
- to inform judges and lawyers of the law in specific areas.

Between 1923 and 1944, the original Restatements published by the ALI included the Restatement of the Law of Agency, Conflicts of Law, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts. Restatements are designed to reflect an informed consensus of the

² Distinguished Texans currently or until recently on the Council include the ALI's current Second Vice President, United States District Judge Lee H. Rosenthal (the First Vice President being Professor Douglas Laycock of the University of Virginia School of Law, formerly of the University of Texas Law School); Treasurer Wallace B. Jefferson, former Texas Supreme Court Chief Justice; former Treasurer, United States Fifth Circuit Court of Appeals Judge Carolyn Dineen King; and Council Member, University of Texas Law School Dean Ward Farnsworth. The incoming President of the ALI is David A. Levi, Dean of Duke Law School. The Secretary is Judge Paul L. Friedman, United States District Court for District of Columbia. The Director is Richard L. Revesz of New York University School of Law, and the Deputy Director is Stephanie A. Middleton of the ALI, which is headquartered in Philadelphia, Pennsylvania.

American legal community's best and brightest scholars, judges, and practitioners. In 1952, the ALI began its Restatement Second series with new analyses and authorities. And, in 1987, it began the Restatement Third with a new Restatement of United States Foreign Relations Law. The Restatement Third series now includes Agency, the Law Governing Lawyers, Property, Restitution and Unjust Enrichment, Suretyship and Guaranty, Torts (Products Liability, Apportionment of Liability), Physical and Emotional Harm, and Unfair Competition. As the law continues to develop, the time is coming when the ALI will introduce the Restatement Fourth.

ALI has also promulgated Model Codes of Law to guide legislatures. ALI "Handbook for ALI Reporters and Those Who Review Their Work" states that "in many respects the formulations in these projects do not differ from the Restatements." As with the Restatements, Model Code Projects require Reporters to review and build upon, rationalize, and synthesize the existing law and to propose "modest incremental improvements" in the law. Reporters are cautioned against involving the ALI in "novel social legislation" in the guise of a Model Code. ALI Model Codes include the Uniform Commercial Code, the Model Penal Code, and model acts suggesting clarifications and incremental changes to existing law governing air flight, evidence, federal securities law, land development, pre-arraignment procedure, and property, sometimes in conjunction the National Conference of Commissioners on Uniform State Laws (NCCUSL).

Beginning in 1994 with Principles of Corporate Governance, the Institute has also undertaken Projects in Principles of the Law. As the ALI website states, these projects undertake an "intensive examination and analysis of legal areas thought to need reform" and "generally culminate ... in extensive recommendations for change in the law." Topics dealt with have included Aggregate Litigation, Corporate Governance, Family Dissolution, Software Contracts, Transnational Civil Procedure, Transnational Insolvency, and Transnational Intellectual Property. Current projects include one on Principles of Government Ethics.

All ALI projects must be initially approved by the Council. Projects are headed by one or more Reporters—scholars, usually from academia, who have both the background of expertise and the time to formulate and direct the project and to research and prepare drafts of the proposed Restatements of the Law, Model Codes, and the more recently instituted Principles of the Law that are the ALI's work product. Once the Reporter on a project has completed a draft of a significant portion of the project, the draft is submitted for review and comment to the Advisors and Consultants for that project at a periodic project meeting with the Reporter or Reporters, the ALI Director, and the Deputy Director. After the Reporter has incorporated revisions, the draft is submitted to the Council for approval. Upon approval by the Council, it is submitted to discussion, final revision, and the vote of the membership at the Annual Meeting. Final drafts may issue in the name of the Institute only upon approval of the Council and the membership.

The ALI recognizes that its publications are enormously influential and therefore insists on the integrity and quality of each product. Many courts and legislatures—including those of Texas—look to the ALI's Restatements, Model Codes, and Principles of the Law as authoritative sources of legal principle where there is no direct legal authority on point or no clear statement of the law.

Which brings us to the case that inspired the panel program for which this paper was prepared. It was precisely because there was no clear and satisfactory statement of the law in the complex and newly developing area of strict liability in tort that the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction Texas falls, turned to then recent ALI Restatement (Second) of Torts (1964) in *Borel v. Fibreboard Paper Products*, 493 F.2d 1076 (5th Cir. 1973), and applied the strict liability doctrine for the first time in a case for personal injuries against the manufacturers of asbestos. That case in turn sparked a revolution in the class of mass torts.

Clarence Borel was a Beaumont ship-worker who suffered asbestosis, a lung disease, and mesothelioma, a deadly lung cancer. Borel had worked for more than thirty years in industrial plants and shipyards in the "Golden Triangle" and in the Houston area installing asbestos for insulation and fire prevention. The Borels filed suit against his employer, Fibreboard Paper Products, as well as Johns-Manville Paper Products and nine other manufacturers of asbestos products. They sought \$1,000,000 in damages on several theories, including negligence and strict liability. They alleged that the asbestos with which Borel had worked was "unreasonably dangerous" in that it could cause both asbestosis and mesothelioma. They further alleged that the manufacturers knew of the dangers, which had been published in the scientific literature, but did not warn Clarence Borel. Rather, they allowed him to keep on working with the dangerous product that ultimately caused his illnesses and would cause his death.

Clarence Borel died while the litigation was ongoing, but his widow, Thelma, continued to pursue the suit. Following trial, United States District Judge Joe Fisher of the United States District Court for the Eastern District of Texas in Beaumont entered judgment on a jury verdict on strict liability in favor of his widow on September 29, 1971. The defendants appealed.

In an opinion authored by Judge John Minor Wisdom, the Fifth Circuit upheld the damages awarded Mrs. Borel on a strict liability theory, citing Section 402A of the Restatement of Torts (Second). That section provided, in relevant part:

One who sells any product in a defective condition unreasonably dangerous to the user or consumer ... is subject to liability for physical harm thereby caused to the ultimate consumer or user.³

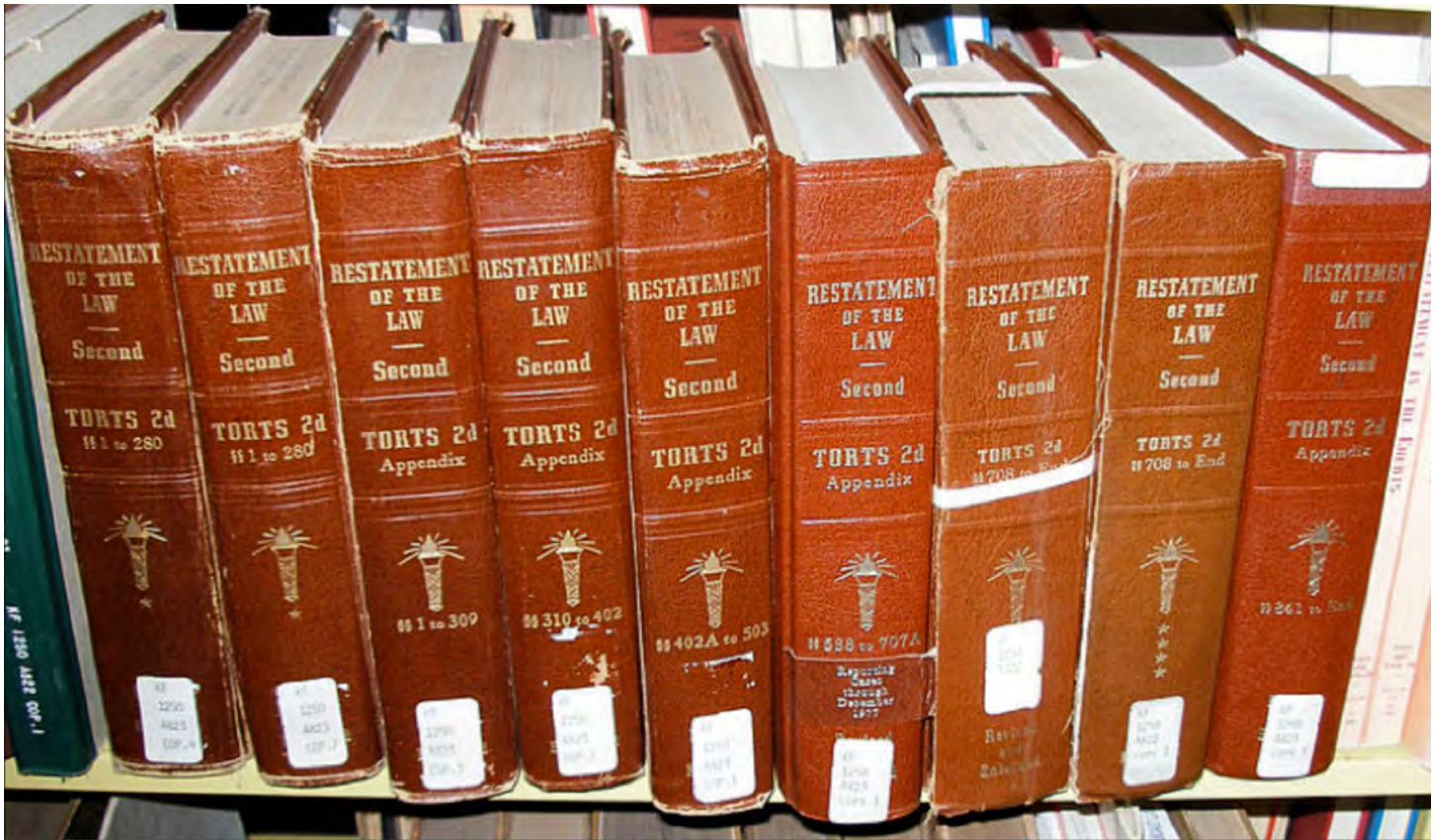
The section continued, "[A] product is 'defective' under the Restatement only if it is '*unreasonably dangerous*' to the ultimate user or consumer."

The court pointed out that the suit was brought under Texas law, and, "[u]nder Texas law, a manufacturer of a defective product may be liable to a consumer in either warranty or tort." And, "[w]ith respect to personal injuries caused by a defective product, the Texas Supreme Court has adopted the theory of strict liability in tort as expressed in section 402A of the Restatement Second of Torts (1964)."⁴ As indeed it had. Texas had adopted the Restatement's statement of the doctrine of strict liability in *McKisson v. Sales Affiliates, Inc.*⁵ only three years after the Restatement Second was published.

³ *Borel*, 493 F.2d at 1087 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW. INST. (1964))).

⁴ *Ibid.*

⁵ 416 S.W.2d 787 (1967).



The Restatement (Second) of Torts

Adopting the strict liability doctrine for asbestos cases, the federal Fifth Circuit Court reasoned that “the requirement that the defect render the product ‘unreasonably dangerous’ reflects a realization that many products have both utility and danger.” *Id.* It referenced comment i to Section 402A of the Restatement, which stated that “a product is unreasonably dangerous only when it is ‘dangerous to an extent beyond that contemplated by the ordinary consumer who purchases it.’” The Fifth Circuit construed this language to mean that, to satisfy the strict liability standard, a product “must be so dangerous that a reasonable man would not sell the product if he knew the risk involved.”⁶

The asbestos Clarence Borel installed for insulation and fire prevention was clearly useful to someone. The question therefore was whether asbestos was *unreasonably* dangerous for those who, like Borel, worked with it and were not warned of the risks that asbestos posed, which, the attorneys for the Borels argued, was known to the manufacturers but not passed on to the asbestos workers. The court of appeals panel agreed that the landmark judgment in the trial court was supported by the evidence and the law correctly applied. And on September 10, 1971, it issued its landmark ruling, upholding the jury verdict against the asbestos manufacturers on the theory of strict liability stated in the ALI’s Restatement of Tort. The court thereby initiated the nationwide mass tort asbestos litigation that both destroyed asbestos manufacturing companies and brought dramatic changes in product safety.

⁶ *Ibid.*, quoting Restatement Section 402A, Comment i.

Ironically, the lawyer for the asbestos manufacturers in the *Borel* case, who argued valiantly on their behalf before the Fifth Circuit, was Page Keeton, distinguished Dean of the University of Texas Law School. Why *ironically*? Because Dean Keeton had served as an appointed Advisor on Restatement of the Law of Torts (Second). Who better to exemplify the type of person the ALI looks to uphold its reputation for scholarship and integrity in its Restatements of the law? Who better to know the law of strict liability thoroughly, and thus best to serve his clients? Who better to know that service to the law in the best interest of clients is a noble calling, win or lose?

And to what better case can we turn to see the value, in complex litigation, of having before the courts the very best statement of the law as studied, clarified, synthesized, and rationalized by the ALI's Restatements of the Law; of having made in the courts the very best arguments of lawyers of the highest reputation on both sides (Ward Stephenson, a founding member of the Plaintiffs' Attorneys Association of Texas later to be renamed the Texas Trial Lawyers Association, argued for the plaintiffs); and of having precedent-setting law of wide application determined by two of the finest judges of integrity in Texas history, Joe Fisher and John Minor Wisdom?

If we seek the best law East and West of the Pecos, we can be grateful not only that we have judges like Judge Wisdom and Judge Fisher, and lawyers like Dean Keeton and Ward Stephenson, but also that a small number of legal scholars, judges, and practitioners—all dedicated to improving the law—met almost one hundred years ago to found the American Law Institute to clarify and improve the law. And their legacy continues today.



JUSTICE EVELYN KEYES was appointed to the First Court of Appeals by Governor Rick Perry in May 2002 after fourteen years of complex civil litigation practice as an associate and partner at Clements, O'Neill, Pierce & Nickens, LLP and as a Special Assistant Attorney General under Attorney General John Cornyn. Justice Keyes earned her J.D. degree cum laude from the University of Houston Law Center, where she was Chief Articles Editor of the Law Review and a member of Order of the Coif, Phi Delta Phi, and Order of the Barons. In 2006, she was elected to the prestigious American Law Institute, where she currently serves as an Advisor to the Principles of Government Ethics Project and a consultant to the Principles of Election Law Project.

[Return to Journal Index](#)

“Justice for All Men”: *Clarence Borel v. Fibreboard Paper Products Corporation*, the Landmark Case in Asbestos Litigation

By Robert J. Robertson and Robert Q. Keith¹

On October 23, 1959, Senator Lyndon B. Johnson came to Beaumont, Texas to celebrate the investiture of Joseph J. Fisher as U.S. District Judge for the Eastern District of Texas. Johnson and Fisher were good friends and fellow Democrats. Their relationship went back to at least 1954, when Fisher practiced law in Jasper, Texas, where he helped Johnson campaign for reelection to the United States Senate. Later, after Johnson became the powerful Senate Majority Leader, and while Fisher was serving as an elected state district judge, Senator Johnson used his political power to help Fisher win appointment to a federal judgeship in Beaumont.² Johnson worked behind the scenes to stall the nomination of John G. Tucker, a Beaumont Republican, and then promoted the rapid approval of Fisher by the Senate Judiciary Committee.

Judge Fisher, a native of San Augustine County and a graduate of the University of Texas School of Law, was sworn into his new office in a majestic courtroom in the massive, neo-classical federal courthouse in downtown Beaumont. This was the same courtroom in which the late Judge Lamar Cecil (1902–1958) had served four years, from 1954 through 1958, allowing him to issue important desegregation rulings in the case involving Beaumont’s municipal golf course (1955) and the litigation involving Lamar State College of Technology (1956). For the investiture of Judge Fisher, Judge Joe W. Sheehy of Tyler, senior judge in the Eastern



Left to right: Judge Joe Fisher, Judge Joe Sheehy, and Senator Lyndon B. Johnson. Photo from the October 24, 1959 issue of the *Beaumont Enterprise*, crediting the Associated Press.

¹ In the preparation of this paper, the author and coauthor received much assistance from attorneys Richard Scheer, Louis Scofield, Gene Dozier (1939–2014), Richard Hile, Frank Newton, Robert Black, and David A. Furlow.

² *Beaumont Enterprise*, October 24, 1959; Letter, Lyndon B. Johnson to Joel Fisher, February 3, 1954, *Fisher Papers*, LBJ Library, Austin, Texas, furnished by U.S. District Clerk for the Eastern District of Texas David J. Maland and Deputy Clerk Mike Lantz, Tyler, Texas; Washington Bureau of News, September 9, 1959. See generally Robert Q. Keith and Robert J. Robertson, *Handbook of Texas Online*, “Borel v. Fibreboard Paper Products Corporation,” <http://www.tshaonline.org/handbook/online/articles/jrb01>.

District of Texas, administered the oath of office in front of more than three hundred people, including Beaumont attorney Gilbert Adams, Beaumont banker John Gray, Jasper attorney Joe Tonahill, U.S. Senator Ralph Yarborough, and Senator Johnson.³

After the induction ceremony, Judge Fisher was honored by a reception in the Sky Room in Hotel Beaumont, where Senator Johnson made complimentary remarks. He discussed the great responsibility of senators to participate in the selection of federal judges; this was especially important and required the greatest care, he said, when selecting judges for one's own state. "This is a happy and proud occasion for me," Johnson explained. "Joe Fisher is a big man in vision and spirit ... As a presiding judge in our state courts, he has shown that he knows not only the letter of the law, but the spirit of the law. In his hands the law is what it is supposed to be — an instrument of justice for all men."⁴

Johnson's praise of Fisher as a judge who would provide "justice for all men" is noteworthy, especially in view of age-old conflicts in the United States between labor and capital, and between workers and corporations, in which workers as individuals had little power and often believed that their rights were abused by the corporations. Sometime during 1963–64, Judge Fisher changed the jury selection process in his court to increase participation by working class citizens, a change that promoted the ideal of "justice for all men." And later, in 1969–71, Fisher presided over *Borel v. Fibreboard*, a case in which the jury applied the new legal doctrine of strict liability and rendered a verdict in favor of the worker plaintiff and against the corporate defendants. It was a verdict that increased the power of workers and reduced the power of corporations, yet another change that likewise promoted the ideal of securing "justice for all men."⁵

Judge Fisher's experience with plaintiffs' law went back to 1947–57, when he practiced law in Jasper, Texas with Joe H. Tonahill and Thomas M. Reavley in the firm Fisher, Tonahill & Reavley. In 1949 Fisher and Tonahill attended a meeting in Fort Worth, and with about thirty other lawyers including Gilbert Adams of Beaumont and Ward Stephenson of Orange, became founding members of the Plaintiffs' Attorneys Association of Texas. Later this group changed its name to the Texas Trial Lawyers Association (TTLA). In 1952, Joe Tonahill served as president of the TTLA. This organization of the plaintiffs' lawyers association in Texas was part of a larger national story that dated back to 1946, when plaintiffs' lawyers meeting in Boston organized the National Association of Claimants' Compensation Attorneys (NACCA), which later became the Association of Trial Lawyers of America (ATLA), moved its headquarters to Washington, D.C., and changed its name to the American Association for Justice in 2006.⁶

³ Mildred Campbell Yates, "In Memoriam: Joseph Jefferson Fisher," *Texas Gulf Historical and Biographical Record*, 36 (2000): 65-76; for the public service of U. S. District Judge Lamar Cecil, see Robert J. Robertson, *Fairways: How Six Black Golfers Won Civil Rights in Beaumont, Texas* (College Station: Texas A & M University Press, 2005), 109, 115, 133, 143-48, 159-164, 182, 187; *Beaumont Enterprise*, October 24, 1959.

⁴ *Beaumont Enterprise*, October 24, 1959.

⁵ For an explanation of the change in jury selection, see Dewey J. Gonsoulin, "Historical Notebook," *Jefferson County Bar Journal* (Winter 2009); for the story of *Borel v. Fibreboard*, see *Borel v. Fibreboard Paper Products Corp.*, 493 F. 2d. 1076 (5th Cir. 1973).

⁶ For brief biographical information, see "Judge Joseph Jefferson Fisher," *Texas Bar Journal* 63, no. 8 (September 2000); for Fisher's participation in the 1949 organization of the Texas Trial Lawyers Association, see John W. Bird, "A Short History of Texas Trial Lawyers Association," *Trial Lawyers Forum*, May-June 1967, 13, 29-33; for the 1946 founding of the Association of Trial Lawyers of America, see American Association for Justice (ATLA until 2006), June 13, 2016, <https://www.justice.org/who-we-are/mission-history>.

John W. Laird, General Counsel of the Texas Trial Lawyers Association, sketched the history of the Texas organization in 1967, when he noted the fundamental difference between “plaintiffs’ attorneys” and “defense attorneys.” The new association of plaintiffs’ attorneys, he said, represented “injured workers, the widows and orphans of those killed on the job,” in contrast with defense attorneys who for many years had represented “railroads, insurance companies, and other industrial groups” and “operated their own associations for the benefit of themselves and their clients.”⁷

Joe Fisher and Ward Stephenson were among the founding members of the Texas Trial Lawyers Association in 1949, establishing a professional relationship that lasted for many years. In 1959, when Fisher was being considered for the federal judgeship for the Eastern District of Texas, Stephenson organized a group of sixteen Orange County lawyers to endorse Fisher’s nomination, sending a telegram to U.S. Attorney General William P. Rogers, along with a copy to Senator Lyndon Johnson. Later, after Joe Fisher became the District Judge for the Eastern District of Texas, Stephenson tried various cases in Judge Fisher’s court in Beaumont, including the landmark *Borel* asbestos case.⁸

Ward Stephenson was a well-known plaintiffs’ attorney who officed in Orange, Texas. A prominent member of the Democratic Party, he developed strong relations with labor unions in Beaumont, Port Arthur, and Orange, a heavily industrialized region known as the “Golden Triangle.” Stephenson handled many cases for union workers injured on the job, often collecting lost wages, medical payments, and other financial benefits for the worker under the Texas Workers Compensation program. But in 1966, Stephenson tried a new strategy. On behalf of Claude J. Tomplait, a union asbestos worker critically ill with pulmonary fibrosis, he filed a product liability, personal injury lawsuit in the federal court of Judge Joe Fisher in Beaumont. The defendants were eleven companies that manufactured the asbestos products that Tomplait used while working in area refineries, petrochemical plants, and shipyards. In Judge Fisher’s court, Stephenson argued the *Tomplait* case, charging the asbestos companies with negligence and breach of warranty, but in the end, May 19, 1969, the jury decided against Tomplait and in favor of the asbestos companies.⁹



Clarence Borel’s counsel Ward Stephenson. Photo from *Southeast Texas Legends*, courtesy of the Beaumont Foundation of America.

Stephenson lost the *Tomplait* case, but he emerged from the experience with more knowledge about asbestos and a new sense of judgment against the asbestos companies. For the June 1970 issue of the *Trial Lawyers Forum*, a magazine published by the Texas Trial Lawyers

⁷ For the contrast between plaintiffs’ lawyers and defense lawyers, see Laird, “Short History of Texas Trial Lawyers Association,” 29.

⁸ For Ward Stephenson’s telegram of August 11, 1959, see Judge Joe Fisher Papers, LBJ Library, Austin, Texas.

⁹ For biographical sketch of Ward Stephenson and his representation of Claude Tomplait, see Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York: Pantheon, 1985), 6-36.

Association, Stephenson wrote an article, “Death and Injury from Inhalation of Asbestos Dust.” In that article, he explained four important things: (1) how exposure to asbestos dust could produce often fatal respiratory ailments including asbestosis, lung cancer, and mesothelioma; (2) how a long latency period, sometimes up to twenty to forty years, existed between exposure to asbestos and the onset of symptoms; (3) how Dr. Irving J. Selikoff, Mount Sinai School of Medicine, New York, and other physicians had published abundant scientific information about the dangers of asbestos years earlier; and (4) how asbestos companies had done little to advise and protect the workers from exposure to their products. By implication, Stephenson was raising fundamental legal and moral questions—questions about why the asbestos companies had not warned the asbestos workers about the dangers of their products.¹⁰

In his article, Stephenson advised fellow plaintiffs’ lawyers about prospective asbestos cases, but at the same time he was already working on his next case. On October 20, 1969, he filed suit in *Clarence Borel v. Fibreboard Paper Products Corporation* in Judge Fisher’s Beaumont court. On behalf of Clarence Borel, an asbestos worker, Stephenson sought \$1 million in damages against Fibreboard Paper Products Corporation, Johns-Manville Products Corporation, and nine other asbestos manufacturing companies.

Clarence Borel, a member of Asbestos Workers’ Union, Local 22, Houston, worked for more than thirty years in industrial plants and shipyards in the “Golden Triangle” and in the Houston area, where he installed insulation and fire-prevention asbestos products. When Stephenson initiated his lawsuit in 1969, Borel was seriously ill with pulmonary asbestosis and mesothelioma, two forms of lung disease. He then lived in Groves, Texas, a residential community adjacent to Port Arthur. He and his wife, Thelma, had a home first on Howe Street and later on Lawndale Avenue where they reared five daughters—Sherry, Phyllis, Sylvia, Brenda, and Kathy—and one son, Bracy. They were active members of the Groves Assembly of God Church, where Clarence served as superintendent of the Sunday school.

In a recent interview, one of Clarence Borel’s daughters, Phyllis Borel Martinez, remembered going to Houston with her mother to help care for her father, where he underwent a surgery performed by Dr. Michael DeBakey and Dr. Kenneth Ricks. The surgeons removed part of Borel’s lungs, and later Dr. Ricks talked privately to Phyllis about the mesothelioma, explaining that the disease was an aggressive malignancy and would most likely cause her father’s death. After they returned to their residence on Lawndale Avenue, Clarence’s condition worsened and he was soon confined to a couch in the living room, where he and Thelma received many visits from friends and family. He and Thelma and their family members shared much talk and good memories about earlier days. Phyllis also remembers being with her father in the living room when he was visited by his lawyer, Ward Stephenson, and when he was interviewed by seven or eight defense lawyers representing the asbestos companies.¹¹ Clarence Borel continued to sicken and died of Medullary Failure due to Overwhelming Toxemia and Generalized Carcinomatosis on June 3, 1970.¹²

¹⁰ Ward Stephenson, “Death and Injury from Inhalation of Asbestos Dust,” *Trial Lawyers Forum* 4, no. 5 (April–May–June, 1970): 17-18, 39-41.

¹¹ Author’s interview with Phyllis Borel Martinez, February 3, 2016.

¹² Jefferson County Death Certificate, Clarence Borel, June 3, 1970, Ancestry.com.



Clarence Borel, and the home he shared with Thelma Borel.



Clarence Borel and his family. Photographs provided by Phyllis Borel Martinez.

In the *Borel* litigation, Stephenson made by-now-customary allegations against asbestos manufacturers, accusing them of negligence and breach of warranty. But he broadened his attack, arguing that the manufacturers should also be held responsible under the doctrine of strict liability, a doctrine restated and summarized by the American Law Institute. A nationwide ALI committee of scholars, jurists, and lawyers restated and analyzed the doctrine in Section 402A of the Restatement of the Law of Torts (Second) (1965). The Texas Supreme Court adopted ALI's strict-liability doctrine officially in Texas in 1967 in *McKisson v. Sales Affiliates, Inc.*, 416 S. W. 2d 787, 788-91 (Tex. 1967).¹⁴

Citing the new provisions of Section 402A, Stephenson charged that asbestos manufacturers were subject to the doctrine of strict liability, arguing that their products were unreasonably dangerous because they did not carry adequate warnings of foreseeable dangers associated with them. As presented by Stephenson, the *Borel* case became the first litigation in the United States to test the application of Section 402A to asbestos materials.¹³

Judge Fisher opened the jury trial in his Beaumont courtroom on September 21, 1971. Clarence Borel had died a year earlier, and his widow, Thelma, was substituted as the plaintiff. In the trial, Stephenson attacked the asbestos manufacturers, accusing them of negligence and breach of warranty, and also charging the companies with violation of the newly revised doctrine of strict liability, arguing that they were strictly liable for the disease and death of Borel.¹⁴

Defense attorneys included George A. Weller, who represented Fibreboard, and John G. Tucker and Gordon R. Pate, who represented Johns-Manville. They and the other defense attorneys argued that scientific knowledge about the dangers of asbestos exposure was incomplete at the time, and that the plaintiff had assumed the risk and was guilty of contributory negligence.



George A. Weller



Gordon R. Pate



John G. Tucker

¹³ Brodeur, *Outrageous Misconduct*, 39-41. For more about the dangers of asbestos and related litigation, see Jock McCulloch and Geoffrey Tweedale, *Defending the Indefensible: The Global Asbestos Industry and Its Fight for Survival* (New York: Oxford University Press, 2008), 2-11.

¹⁴ Brodeur, *Outrageous Misconduct*, 41-45 and 45-52; Borel obituary, *Beaumont Enterprise*, June 4, 1970.

Disputing these arguments, Stephenson cited the work of Dr. Selikoff of New York and others who had published abundant scientific information beginning in the 1930s about the dangers of asbestos materials. Stephenson charged that the manufacturers knew or should have known about the dangers of their products and had not warned Borel of their harmful effects.¹⁵

On the last day of the trial, after Stephenson and the opposing lawyers made their closing statements, Judge Fisher read the charge to the jury, discussing negligence and contributory negligence, as well as the revised doctrine of strict liability. Fisher reviewed the new strict liability doctrine carefully, explaining to the jury that a product manufacturer is held to the skill of an expert in that business and to an expert's knowledge of the product, and that the manufacturer is bound to keep abreast of scientific knowledge about the product and to issue warnings about possible harm that might come to people who use the product. As he completed the trial, Judge Fisher issued various interrogatories, instructing the jurors to answer specific questions about the negligence of the manufacturers, the contributory negligence of Borel, the strict liability of the manufacturers, and lastly, the amount of money, if any, owed to Thelma Borel.¹⁶

The next day, on September 29, 1971, foreman Roy L. Jenkins and the jury issued a verdict, finding that the asbestos manufacturers were strictly liable for the disease and death of Clarence Borel. For Thelma Borel, the jury found total damages of \$79,436, an amount that was reduced to \$32,222 by previous settlements and by legal fees owed to attorney Stephenson. A few days later, Stephenson filed a motion with Judge Fisher requesting a judgment and a resolution of all issues in favor of Mrs. Borel, while the defense attorneys filed motions for judgment on behalf of the asbestos companies and requested a new trial. Judge Fisher issued the judgment in favor of Mrs. Borel and denied all motions by the defense, thus confirming victory for Stephenson and Mrs. Borel in the District Court.¹⁷

Lawyers for the defendant manufacturers appealed the *Borel* judgment to the United States Court of Appeals for the Fifth Circuit in New Orleans. Oral arguments were heard on November 14, 1972, before Judges John Minor Wisdom, Elbert Tuttle, and John Milton Bryan Simpson. Ward Stephenson, who was himself ill with cancer, represented Appellee Thelma Borel, while W. Page Keeton, Dean of the University of Texas School of Law, represented Fibreboard and the other asbestos-manufacturing appellants. A member of the American Law Institute, Keeton had served as an adviser in the recent publication of the Restatement of the Law of Torts (Second). In oral arguments before the Fifth Circuit, Stephenson and Keeton battled over the availability of scientific information about the dangers of asbestos materials as well as theories of negligence, contributory negligence, and strict liability. In a decision drafted by Judge John Minor Wisdom, the Fifth Circuit issued a ruling in favor of Thelma Borel, affirming the judgment based on the verdict of strict liability against the asbestos manufacturers.

¹⁵ Brodeur, *Outrageous Misconduct*, 45-52.

¹⁶ *Ibid.*, 62-63.

¹⁷ *Ibid.*, 63-65. The name of the jury foreman, Roy L. Jenkins, was reported by Fort Worth attorney Gene Dozier (1939-2014), who reviewed the *Borel v. Fibreboard* case file in the National Archives, Fort Worth, Texas, on January 14, 2013.

¹⁸ *Ibid.*, 65-69, 73-74.



Page Keeton, UT Law School Dean.
Photo courtesy of the Dolph Briscoe Center
for American History.

Borel's lawyer Ward Stephenson, who reportedly received the good news of his victory by telephone, passed away on September 7, 1973, just three days before the official publication of the *Borel* ruling on September 10, 1973. Later, the asbestos companies appealed the Fifth Circuit's ruling to the United States Supreme Court through a petition for *certiorari*, but the case was declined by the Court, thus leaving intact the finding in Judge Fisher's court that the asbestos companies were strictly liable for the death of Clarence Borel.¹⁶

The actions of attorney Stephenson, Judge Fisher, and the judges of the Fifth Circuit Court of Appeals in the *Borel* case had enormous implications. With the affirmation of strict liability against the asbestos companies, the power of working class Americans and their attorneys was advanced, and the power of the asbestos corporations and their insurance companies was diminished. Thousands of asbestos workers, their families, and their lawyers filed personal injury claims against dozens of asbestos companies

and their insurance companies. According to Paul Brodeur, author of *Outrageous Misconduct: The Asbestos Industry on Trial* (1985), the *Borel* decision "triggered the greatest avalanche of toxic-tort litigation in the history of American jurisprudence."¹⁷

Some twenty-five thousand lawsuits were brought over the next decade as word spread that asbestos manufacturers could be held strictly liable under the law. During the next three decades, the implications of the *Borel* case grew dramatically, with the filing of increasing numbers of personal injury claims based on asbestos exposure. Filed in federal and state courts, the large numbers of claims often evolved into mass tort litigation, where plaintiffs' lawyers represented multiple workers and initiated personal injury suits against multiple asbestos companies.

Beginning in 1980, asbestos litigation was broadened to include property damage claims, when school districts and other public entities across the nation filed suit against asbestos companies for the costs of removing dangerous asbestos materials from public buildings. The first such suit in Texas, *Dayton Independent School District v. United States Gypsum Co.*, was filed in 1981 by Martin Dies III, a member of the same law firm in Orange, Texas, where Ward Stephenson had represented Clarence Borel. Dies filed the *Dayton ISD* case in the U.S. District Court of Judge Joe Fisher, the same court where the *Borel* case had been decided. Representing eighty-three Texas school districts, attorney Dies worked with fellow attorney Richard C. Hile and with co-

¹⁶ *Ibid.*, 69–70.

¹⁷ *Ibid.*, 73–77.

counsel Kelly Frels of Houston, and in 1987 negotiated confidential financial settlements with the asbestos companies. Later, Dies & Hile handled other asbestos property damage suits in Judge Fisher's court.¹⁸

The RAND Institute of Civil Justice, a research institute in California, reported in 2005 that "asbestos litigation is the longest running mass tort in the United States." Here RAND quantifies the consequences of the "mass tort" litigation. More than 730,000 plaintiffs had filed personal injury claims, often against multiple defendants for asbestos-related injuries, and a total of \$70 billion had been paid by defendants and insurers. At least 8,400 companies had been named as defendants and at least seventy-three companies, including Johns-Manville Corporation, had filed bankruptcies. The RAND Institute provided additional data in 2011, reporting that 56 asbestos personal injury trusts had been set up by asbestos companies which had filed for bankruptcy, and that as of 2008, the 26 largest trusts had paid out \$10.9 billion on 2.4 million claims.¹⁹

On March 9, 2016, the RAND Institute website featured a brief headline: "Asbestos Litigation. Understanding and quantifying asbestos litigation compensation and costs can help policymakers assess how best to resolve future claims for everyone." That headline introduced thirteen different RAND articles from 1992 to 2015 that covered different aspects of asbestos litigation.²⁰

Just thirty days before his accidental death, my friend and coauthor, the late Robert Q. Keith, praised the late Judge Fisher, listing positive consequences of his actions in the *Borel* case: (1) "hundreds of product manufacturers have been held financially responsible for product defects," (2) "new judicial procedures have been conceived to deal with the mass tort phenomena," (3) "insurance policies and practices have been amended," and (4) "comprehensive health and safety regulations have undergone substantial revision." All of these improvements, Keith wrote, "stem from the acumen of United States District Judge Joe J. Fisher and his courage to apply the law equally to all parties coming before him."²¹

As Bob Keith praised Judge Fisher for "his courage to apply the law equally to all parties," we are reminded of Senator Lyndon Johnson, who in 1959 praised Fisher as a judge in whose hands the law was "an instrument of justice for all men." Justice for all parties! Justice for all men! And as we praise Judge Fisher for the positive consequences of the *Borel* case, we should also give credit to Ward Stephenson, the plaintiffs' lawyer who demanded justice from the asbestos companies, as well as to Clarence and Thelma Borel, the plaintiffs who suffered and

¹⁸ William French Smith, *The Attorney General's Asbestos Liability Report to the Congress, Pursuant to Section 8(b) of the Asbestos School Hazard Detection and Control Act of 1980*, September 21, 1981, v-xiii; Dies & Hile, LLP, "Notes," *Asbestos Litigation in Texas* (2012); *Dayton Indep. Sch. Dist. v. United States Gypsum, et al.*, Civil Action B-81-277-CA/B-81-293-CA.

¹⁹ Stephen J. Carroll, et al., *Asbestos Litigation Costs and Compensation; An Interim Report* (Santa Monica, CA: RAND, 2002); Carroll, et al., *Asbestos Litigation, Costs, Compensation, and Alternatives* (Santa Monica, CA: RAND, 2005); Lloyd Dixon and Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Santa Monica CA: RAND, 2001).

²⁰ RAND Corporation, March 9, 2016, <http://www.rand.org/jie/justice-policy/civil-justice/pubs/asbestos.html>.

²¹ Robert Q. Keith, email October 14, 2011.

paid the ultimate price for the negligence of the asbestos companies, and whose sacrifices opened the door to justice for thousands of other asbestos workers.²²

²² *Ibid.*



ROBERT J. ROBERTSON is the author of *Her Majesty's Texans: Two English Immigrants in Reconstruction Texas* (College Station: Texas A&M University Press, 1998) and *Fair Ways: How Six Black Golfers Won Civil Rights in Beaumont, Texas* (College Station: Texas A&M University Press, 2005). He is an adjunct instructor in history at Lamar University.



The late **ROBERT Q. KEITH** practiced law for fifty-two years throughout the courts of Texas, Louisiana, New Mexico and Washington D.C. where he argued three cases before the U.S. Supreme Court. At the time of his death in 2011, he was a partner in the Johnson City law firm of Keith & Weber.

[Return to Journal Index](#)

A Brief History of the Texas Supreme Court Clerk's Office

By Tiffany S. Gilman and Blake Hawthorne

The Clerks of the Texas Supreme Court have come from many backgrounds, and in a way their history reflects the history of our state. They have included military officers, a congressman, a Texas Ranger, a mayor of Austin, a Swedish immigrant, a doctor, ministers, the son of a Chief Justice, and of course many lawyers. Most were not born in Texas, but built lives here and contributed to the formation of the state. All were individuals dedicated to the rule of law and the efficient operation of Texas's highest Court.



Portrait of William Fairfax Gray.
Photo from the Herzstein Library, San Jacinto
Museum of History. The original painting hangs
in the Christ Church Cathedral, Houston.

The Supreme Court of the Republic of Texas was authorized by the Constitution of 1836, adopted at Washington-on-the-Brazos on March 17, 1836. The new Constitution did not call for a Clerk or any support staff to assist the Court in its duties. But the first Chief Justice, James Collinworth, knew the position was necessary and appointed the first Clerk, William Fairfax Gray, in 1837. A Virginia native and militia colonel who had seen action in the War of 1812, Gray was a new lawyer who had attended law lectures from November 1834 until March 20, 1835 in Virginia, receiving his license to practice on May 4, 1835. Later that same year, he traveled to Texas to purchase land titles for businesses back in Virginia, and found himself in the middle of the Texas Revolution, attending and documenting the Convention of 1836. His diary during this period was preserved, and historian Andrew Forest Muir described it as "one of the most important sources for the history of revolutionary Texas."¹ In his diary, Gray documented perhaps the first eye-witness account of the Alamo battle by Col. William Travis's former slave, Joe, just two weeks after the Alamo's fall.

¹ Andrew Forest Muir, "William Fairfax Gray, Founder of Christ Church Cathedral," *Historical Magazine of the Protestant Episcopal Church* 28, no. 4 (Dec. 1, 1959): 343. Gray's diary may be read and downloaded at: <http://j.mp/GrayDiary>.

Prior to being Clerk, Gray had also served as the Texas House of Representatives clerk, secretary to the Senate, and district attorney. Due to the tumultuous nature of the early Republic and Collinsworth's untimely death, Gray's first act as Court Clerk did not happen until the first court session on January 13, 1840 in Austin. Describing his time with the Court, Muir commented that the first Clerk had "few duties" and yielded "few fees,"² probably because there was no constitutional provision for his salary. During his role as Clerk, Gray advertised his legal services in local newspapers, attesting to his need for additional employment as well as a lack of prohibition against practicing law independently.

William Fairfax Gray,
ATTORNEY AT LAW, CITY OF HOUSTON.

PROPOSES attending the superior court of the second judicial district; the county courts of Harrisburg, and other adjacent counties where he may have business of sufficient importance to require his attendance.

He also offers his services as an AGENT, for the purchase or sale of lands, investigation of titles, &c. Having an extensive acquaintance in the United States, and keeping his office at the seat of government, where all strangers coming into the country will resort. Persons having lands which they are desirous of selling, might find it to their interest to place the agency in his hands.

Communications addressed to him on business at the city of Houston, will be promptly attended to; and all business entrusted to him shall be despatched with diligence and fidelity.

REFERENCES.

<p>Hon. B. T. Archer, Edwin Waller Esq., <i>Near Brazoria.</i> May 16, 1837.</p>	<p>Hon. P. W. Grayson, Forbes, Brooks & Co., <i>Merchants Marion.</i></p>	<p>Hon. James Collinsworth,</p>
---	---	---------------------------------

69-tf

Advertisement of Gray's legal services.
 Image from *Telegraph and Texas Register*, May 16, 1837.

Upon his death, Gray was replaced by Thomas Green, a veteran of the Battle of San Jacinto, in 1841. Green had been among the company that manned the famous Twin Sisters cannons during the battle, and had recently represented Fayette County in the Republic's House of Representatives and served as Senate secretary. Fearing Mexican invasion that same year, Sam Houston initially moved the national capital to Houston, then to Washington-on-the-Brazos from 1842 to 1844. The Court met during this period wherever the seat of government was located. Legislation passed on January 22, 1842 established another annual term to be held at Nacogdoches, but changed that by an act passed on February 3, which directed the Court to hold its annual term at Washington.

The United States annexed Texas on December 29, 1845, and a new constitution went into effect. Notably, this state Constitution included a Texas Supreme Court Clerk—no doubt due to the lobbying of the Court's justices to assist them in their travels to sessions throughout the year in Austin, Galveston, and Tyler. This circuit-riding practice continued through Secession and the Civil War period. Prior to the war, Clerk Green accompanied the judges in their travels across

² *The Diary of William Fairfax Gray, from Virginia to Texas, 1835-1837* (Dallas, TX: William P. Clements Center for Southwest Studies, Southern Methodist University, 1997).

the state. In between court sessions he served in military campaigns against the Comanche Indians, and during the 1846 Mexican-American War he recruited and commanded a company of Texas Rangers.

In 1861 Green joined the Confederate Army as a colonel and later brigadier general, and died leading a charge on Union gunboats in April 1864.³ Tom Green County is named in his honor. In November of 1864 each of the Court's meeting locations began to employ its own Clerk, each with his own records and docketing system, which would create a major recordkeeping headache in the years to come.

In the post-war years between 1867 and 1869, all of the Supreme Court Clerks were removed from office as "impediments to Reconstruction" and replaced by order of the occupying Union government in Austin. Four successive Clerks were removed during this time.⁴ The Texas Constitution of 1869 allowed for the Supreme Court's annual meetings in Austin only—the Clerks in Galveston and Tyler were released from their positions, and the law library at Galveston was sold to book dealers in St. Louis. The Court began traveling between Austin, Galveston, and Tyler again after the Constitution was amended in December 1873, with an additional act in February 1874 providing that the Court hold its sessions once in every year in those cities.

Clerks for Galveston and Tyler were again appointed to assist the Court during its sessions beginning in February of 1874.⁵ One of the Galveston Clerks, Daniel Atchison, was also a philanthropist who contributed to the establishment of Austin College and supplied the funds to found the Atchison Free School in Navasota.⁶ A briefly appointed Austin Clerk in 1869, Edwin M. Wheelock, was a minister and superintendent of the Freedmen's Bureau schools, and was instrumental in forming the Texas Republican Party.

The former mayor of Austin, William Penn DeNormandie, became Clerk of the Austin Court in December of 1869. Born in Pennsylvania, DeNormandie fought with the Kentucky cavalry in the Mexican American War and was taken prisoner in Mexico, but escaped in 1847⁷ and later settled in Texas. In 1853, he was appointed mayor of Austin. He served as Clerk of the



Thomas Green, 1864.
Photo from Francis Trevelyan Miller and Robert S. Lanier, *The Photographic History of the Civil War*, Vol. 10 (New York, 1911), 153.

³ Alwyn Barr. "Green, Thomas," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/fgr38>.

⁴ S. H. Morgan (Nov. 1864–1866); George W. G. Brown (1866 –Sept. 1867); George H. Gray, Jr. (Oct. 1867–Oct. 1869); Edwin M. Wheelock (Oct. 1869–Dec. 1869).

⁵ J. H. Davenport, *The History of the Supreme Court of the State of Texas* (Austin: Southern Law Book Publishers, 1917).

⁶ "Atchison dead," *The Louisville Courier-Journal*, December 26, 1898, 2.

⁷ "Escape of Eight American Prisoners," *The Evening Post*, New York, NY, Saturday, July 24, 1847, 3.



The "Semicolon Court" (seated), with E. M. Wheelock (left) and Clerk W. F. DeNormandie, 1874.
Photo courtesy of the Austin History Center.

U.S. District Court in Austin in 1856 and was elected secretary of the Union Club in 1860.⁸ He participated in pro-Union rallies in 1861, described by an onlooker as a member of a "company of 'Union men' called 'home guards' [who] drilled in the manual of arms until a short time after Fort Sumter was assaulted. Then many of them crossed the Rio Grande."⁹ DeNormandie fled Texas for the duration of the war, but returned in July of 1865 on the same ship as Governor A. J. Hamilton,¹⁰ and served as the postmaster of Austin before his appointment as Clerk. According to the U.S. Census, by 1880 his eldest son Edward had joined him as Deputy Clerk. DeNormandie died in office in 1881.

⁸ *The Southern Intelligencer* (Austin City, Tex.), vol. 5, no. 3, ed. 1, Wednesday, September 5, 1860.

⁹ A. W. Terrell, "The City of Austin from 1839 to 1865," *Southwestern Historical Quarterly* XIV (1911): 120.

¹⁰ *Houston Tri-Weekly Telegraph*, vol. 31, no. 53, ed. 1, Wednesday, July 26, 1865.

The circuit-riding practice continued under the Constitution of 1876, but ended under a constitutional amendment adopted September 22, 1891, which permanently moved the Court's seat to the capital city of Austin. The records from this period, with their idiosyncratic numbering and docketing methods, were shipped to Austin from the Galveston and Tyler locations.¹¹ These individual filing systems were maintained until the mid-1930s, when long-time Clerk Charles Morse passed away, taking his vast, intricate knowledge of each system with him.



Deputy Clerk F. T. Connerly, Clerk Charles S. Morse, with Court. Undated. Photo: Austin History Center.

Morse's Deputy, Carl Lyda, wrote in his memoir that "oftimes both of us together would search a whole day or more for a particular record then be compelled to conclude we did not have it."¹² Lyda said that around 1944 he revamped the Court's docketing system, which at one time had multiple docket types spread out over six different ledgers. According to Lyda, "every case coming to the Court would appear on at least two, and sometimes on all, of these dockets... No list of the documents filed with the record in the different cases was noted anywhere...[T]he only way to ascertain the status or history of a case was to search through all the dockets."

Instead Lyda created a "one docket" system, where every case filed, "regardless of its nature or from where or how it came to the Supreme Court would be assigned a separate docket sheet and separate number, and every paper filed in that case ... would be filed and docketed under that one number."¹³ The Court implemented his idea, which paved the way for its modern case-numbering system.

About the same time, according to his memoir, Lyda had come up with a plan to eliminate the many duplicate and nonsensical cause numbers from the nineteenth century by consecutively renumbering the cases, disregarding the old ones, and cross-filing them with their docket entries. The Deputy Clerk assigned new numbers with an "M-" prefix to all the pre-1892 files and created a card index to the cases.¹⁴ To this day, his index is the only access point for most of the cases. This process took over two years, but the end result allowed for easier access and assists the archival research and replevin efforts underway today.

¹¹ Kyle Gregory, "Through the Lens of History: Republic of Texas-Era Court Cases Shed New Light on State's Past," *Texas Heritage* 2 (2013): 13.

¹² C. B. Lyda, "Forty-five Years Association with the Supreme Court of Texas," unpublished typescript, May 1971, Texas Supreme Court Archives.

¹³ *Ibid.*

¹⁴ *Ibid.*



Texas Supreme Court Clerk's Office, 1914. Left to right: Deputy Clerk J. S. Myrick, Deputy Clerk H. L. Clamp, and Clerk Fred T. Connerly. Photo courtesy of the Austin History Center.

In April of 1972, Clerk Garson Jackson noticed 1,853 Supreme Court records in 62 “wallets” missing from the Clerk’s Office records storage basement.¹⁵ After a subsequent investigation, he found out that they had been stolen by Earl Collins, a porter for the Third Court of Appeals.¹⁶ The story was that custodians and porters would often gather in the basement for lunchtime games of dominos, during which Collins would sneak away to pilfer records. The cases stolen were

¹⁵ G. Jackson, Letter to Security Division, State Board of Control, August 9, 1973, Texas Supreme Court Archives.

¹⁶ T. E. O’Quinn, Letter, December 18, 1972, Texas Supreme Court Archives.

the M-prefix cases dating from 1840 to 1892, many dealing with slavery disputes or containing the signatures of famous Texans such as Sam Houston and Stephen F. Austin.¹⁷ Collins was an amateur signature collector, and had connections in the antiquities market.

By the time Collins was arrested and charged with “larceny of file papers” in August 1973, the unscrupulous porter had already sold all of the stolen records to dealers and unknown persons. He was convicted in 1974 of larceny and received probation.¹⁸ While initially approximately 600 records were recovered, over the next twenty-five years only about 40-50 additional files were returned.¹⁹ Knowledge of the M- prefix numbering system (and many sellers’ attempts at removing the telltale stamps) assisted the Texas State Library and Archives in the fall 2012 recovery of 90 additional case files from an auction in New Jersey. Hundreds, and possibly thousands, of these case files are still missing, creating a major gap in the rich historical resource. The State Archives hopes that its investigative research, along with Deputy Clerk Lyda’s case file index, will help augment its list of known missing documents that are now in private hands.

One historical relic in the custody of the Texas Supreme Court Clerk’s Office that survived the 1972 theft is the Supreme Court “Sam Houston” Bible. At some point during the Republic era, the Court’s famous 1816 King James Bible, now used at every gubernatorial inauguration and many elected officials’ investitures, became a part of the Court’s collection. This is indicated by the calligraphic script that reads “Supreme Court of the Republic of Texas- 184-” and could date from any time between 1840 and December 1845. The legend often repeated at the Court is that the Bible was once the property of Sam Houston, who gave it to the Court. While modern research has cast doubt on the veracity of this story, the Bible has been in regular use at investitures and inaugurations at least since the late nineteenth century, and as long as anyone can remember has been in Clerk’s Office custody.

Deputy Clerk Max Bickler (whose home still stands on Judge’s Hill in Austin) recalled that the Bible was in use when he began work in 1911, and the Court’s porter “Old Alex” Phillips, who had been with the Court for over fifty years at that time, claimed it had always been used at inaugurations.²⁰ Deputy Clerk Bickler became a well-known fixture at inaugurations beginning with Governor James Ferguson’s in 1917, when he took over the duty from the Clerk, Fred T. Connerly, who reportedly did not relish public



Max Bickler in Austin, Texas, 1906.
Photo courtesy of the University of Texas
at San Antonio Libraries.

¹⁷ Gregory, “Through the Lens of History,” 13.

¹⁸ Report on the Preservation of Historical Texas State Court Records, Texas Supreme Court Records Task Force, August 2011, 58.

¹⁹ Laura K. Saegert, “Preservation of the Texas Supreme Court’s History Requires Preservation of Its Files,” *Journal of the Texas Supreme Court Historical Society* 2, no. 4 (Summer 2013): 20-21; G. Jackson, “Rec’d from FBI, August 2, 1976,” unpublished document, August 1976.

²⁰ D. Fairchild, “Bickler Funeral Held Here Today,” *Austin American-Statesman*, January 1971.

appearances.²¹ Bickler continued to be the de facto “master emeritus of protocol for Texas inaugurations” even after his retirement in 1957, and continued this dedicated duty right up to his death in 1971.²² Today the Clerk’s Office still maintains vigilant care of perhaps our most precious artifact.

The Clerk’s Office is led by a Clerk and staff who occupy a key role in the efficient operation of the Court. Besides the duties outlined in the Texas Government Code, such as carefully filing and preserving the record, docketing causes, faithfully recording the proceedings and decisions of the Court, and certifying judgments, the Clerk is the Court’s voice to the outside world. The office is steeped in Texas history. While they have come from many different walks of life, the Clerks and their staff have faithfully served the Texas Supreme Court and our state for nearly one hundred and eighty years.

²¹ L. Cardwell, “Bibles behind a Texas Tradition,” *Austin American-Statesman*, January 14, 1973.

²² In Memory of Max H. Bickler, S. Res. 17, 1971 Leg., 62nd (Tex.) (enacted).



TIFFANY (SHROPSHIRE) GILMAN was hired as the Court’s first in-house archivist and records manager in the spring of 2010. Born and raised in Dallas, she earned dual bachelor’s degrees from The University of Texas at Austin through the Liberal Arts Honors program in 2006, then a master’s degree in information studies with an emphasis on archives, and a Certificate of Advanced Study in preservation in 2009.

In addition to being a certified archivist and member of the Academy of Certified Archivists, Tiffany is a member of the Society of American Archivists and the Society of Southwest Archivists, and has served on the Records Management Interagency Coordinating Council and the Texas Court Records Preservation Task Force.



BLAKE A. HAWTHORNE is the Clerk of the Supreme Court of Texas. The Court appointed him to a four-year term on August 1, 2006, and reappointed him to a second term beginning on August 1, 2010 and again on August 1, 2014. Prior to his appointment to Clerk of the Court, Blake served the Court as the Staff Attorney for Original Proceedings. Before joining the Court, he was an Assistant Attorney General for the State of Texas and an associate in the law firms of Wiley, Rein & Fielding in Washington, D.C. and Jackson Walker in Fort Worth, Texas.

Blake is the President of the National Conference of Appellate Court Clerks (NCACC) and Immediate Past President of the Austin Bar Association Appellate Section. He is also a member of the Judicial Committee on Information Technology (JCIT) and serves as the Co-Chair of the Electronic Filing Subcommittee.

[Return to Journal Index](#)

The Evidence Playbook

By Rachel Hooper

evidence, n. Implies both that the tribunal accepts the material as worthy of consideration and that the party offering the material intends to use it as a means of proof.¹

In his opening statement during his nomination hearings before the Senate Judiciary Committee, Chief Justice John Roberts said that his job is akin to that of an umpire and his role in the courtroom is “to call balls and strikes and not to pitch or bat.”² In evidence disputes, umpires and, sometimes, replay officials are necessary. A clear playbook is essential because it allows the litigants the opportunity to become familiar with the rules. For Texas lawyers, that playbook is the Texas Rules of Evidence.

Evidence is instinctual. The study of evidence is akin to the study of a foreign language. All evidentiary analysis involves the relationship between the *factum probans* and the *factum probandum*.³ Evidence may be classified as direct or circumstantial.⁴ Evidence is further labeled as primary or secondary; positive or negative; conclusive, corroborative, cumulative, or *prima facie*; documentary, object, or testimonial; and admissible, credible, or relevant.⁵

Sometimes we receive unexpected glimpses into the lives of Texas Supreme Court justices as a result of a newly discovered object. I recently had the privilege of viewing Peter Gray’s book identifying the laws passed by the First Legislature of Texas. Sam Houston appointed Gray to serve as Harris County District Attorney in 1841.⁶ Gray later represented Harris County in the First Legislature and, at twenty-seven years old, he wrote the Texas Practice Act, the first rules of civil procedure in Texas.⁷ These procedural rules, promulgated in 1846, contained an evidence

¹ Bryan A. Garner, GARNER’S DICTIONARY OF LEGAL USAGE 334 (3d ed. 2011).

² Chris Cillizza, “John Roberts, Umpire,” *Washington Post*, June 28, 2012, https://www.washingtonpost.com/blogs/the-fix/post/john-roberts-umpire/2012/06/28/gJQAx5ZM9V_blog.html.

³ The *factum probans* is the evidentiary fact by which the *factum probandum* or fact to be proved is to be established. Compare *Factum probans*, BLACK’S LAW DICTIONARY (10th ed. 2014), with *Factum probandum*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴ *Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014).

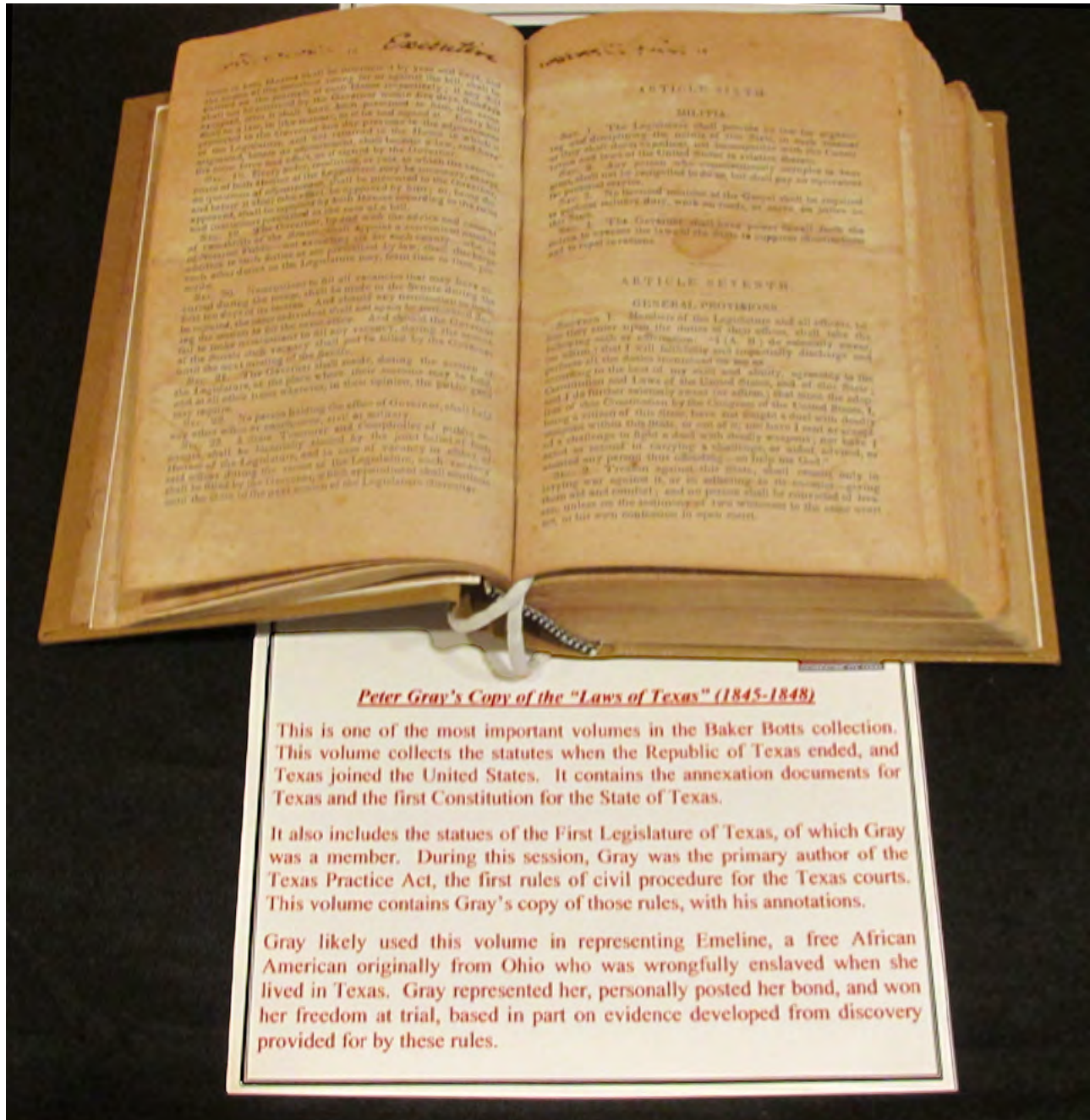
⁵ *Ibid.*

⁶ Thomas W. Cutrer, “Gray, Peter W.,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fg25>.

⁷ *Ibid.* See Baker Botts, <http://www.bakerbotts.com/aboutus/history/175th-anniversary>. Gray formed a partnership with Walter Browne Botts. In 1872, Judge James A. Baker joined the firm, which changed its name to Gray, Botts & Baker. Gray was appointed to the Texas Supreme Court in 1874 and died that same year.

section that presented procedures for written depositions.⁸

Gray's evidentiary rules were quite different from our current Texas Rules of Evidence. His rules were strictly procedural rather than reasoned principles and rules of admissibility. Absent were interrogatories to parties and provisions to compel the production of documentary evidence before trial. Essentially, the only type of discovery in Texas practice for one hundred years was deposition discovery designed to perpetuate admissible testimony.



Peter Gray's *Laws of Texas* (1845–1848), Baker Botts Collection.
Photo by David A. Furlow, by permission of Baker Botts Librarian Robert Downie.

⁸ Act approved May 13, 1840, 1st Cong., R.S., § 67, 1840 Repub. Tex. Laws 363, 379, reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1669, 1689 (Austin: Gammel Book Co. 1898).

Until 1983, Texas practitioners relied on the common law rules of evidence and the analysis of principles provided by certain legal scholars. In 1904, John Henry Wigmore published the *Treatise on the Anglo-American System of Evidence in Trials at Common Law*, commonly known as *Wigmore on Evidence*. Wigmore's chart method, devised in 1913, invited a thoughtful, analytical examination of evidentiary issues, which essentially turned evidentiary inquiries into mathematical equations.

	Defense	Prosecution
1. Testimonial	□	□
2. Circumstantial	○	○
3. Explanatory	>	>
4. Corroborative	△	△

Upon Wigmore's retirement from Northwestern University in 1931, he asked that Charles McCormick, a Texan, be chosen as his successor to carry on his work on the study of evidence.⁹ McCormick, at that time a law professor at the University of North Carolina, accepted the position and taught at Northwestern for nine years before returning to his alma mater, the University of Texas, in 1940 to serve as Dean of the UT School of Law. Three years earlier, in 1937, McCormick had authored the acclaimed *Texas Law of Evidence* with Roy Robert Ray.

McCormick's *Handbook of the Law of Evidence*, first published in 1954, is viewed as his "greatest masterpiece."¹⁰ In his preface, McCormick said that "evidence and the decisions on evidence questions are as the sands of the sea."¹¹ McCormick's study of evidence made the application of theoretical and complicated rules accessible and practical.

Before the start of the Second World War, former U.S. Attorney General William D. Mitchell suggested that an "advisory committee should confront the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court."¹² Legal scholars discussed the idea over the next thirty-seven years.

The Rules Enabling Act, passed in 1934, authorized the U.S. Supreme Court to promulgate rules of procedure for federal courts.¹³ The act assigned the responsibility of proposing rules of

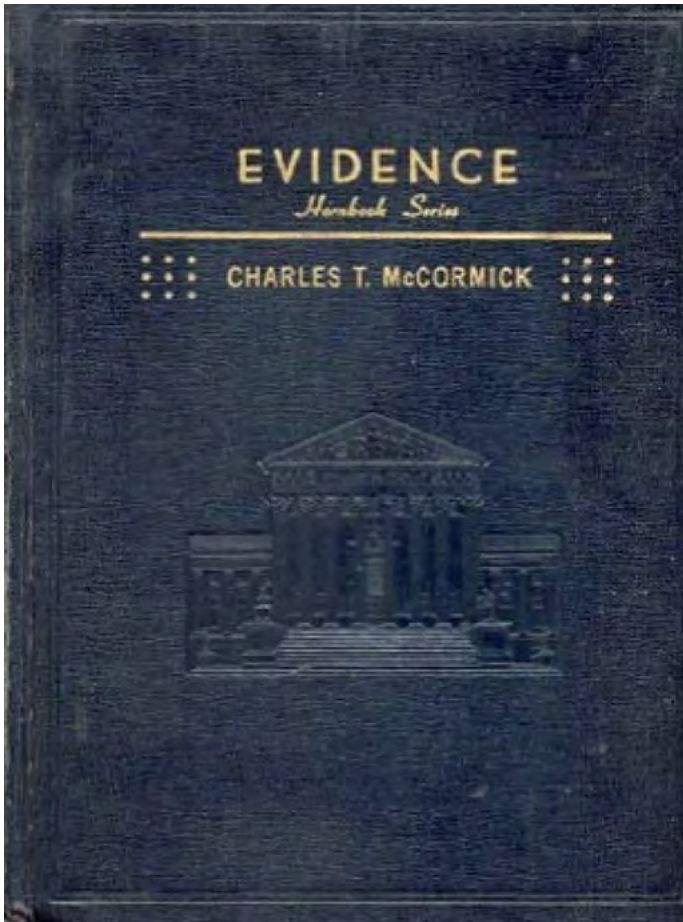
⁹ University of Texas at Austin Faculty Council, "In Memoriam, Charles Tilford McCormick," <http://www.utexas.edu/faculty/council/2000-2001/memorials/SCANNED/mccormick.pdf>.

¹⁰ *Ibid.*; Charles T. McCormick, *Handbook on the Law of Evidence* (St. Paul: West Pub. Co., 1956).

¹¹ UT Faculty Council, "In Memoriam."

¹² Judicial Conference of the United States Committee on Rules of Practice and Procedure, *Rules of Evidence; A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the U.S. District Courts* 1 (1962), quoting Proceedings of Cleveland Institute on Federal Rules 186 (1938).

¹³ Act of June 19, 1934, Pub. L. No. 415, 73d Cong., 2d Sess., 48 Stat. 1064, codified as amended at 28 U.S.C. §§ 331, 2071-77 [hereinafter "Rules Enabling Act"].



Left: Charles T. McCormick's *Handbook on the Law of Evidence*. Right: Charles Tilman McCormick, McCormick Society, University of Texas Law School.

federal practice and procedure to the Supreme Court.¹⁴

The Committee on Rules of Practice and Procedure was established in 1958. In 1961, the Supreme Court appointed an Advisory Committee on Rules of Evidence tasked with the development of evidence rules.¹⁵ The Advisory Committee consisted of trial lawyers, legal professors, and federal judges, including Joe E. Estes, Chief Judge for the Northern District of Texas. University of Texas School of Law Professor Charles Alan Wright assisted the Advisory Committee.

On January 30, 1969, the Advisory Committee on Rules of Evidence sent the first preliminary draft of the Federal Rules of Evidence to the Chairman of the Standing Committee on Rules of

¹⁴ Rules Enabling Act, *supra* note 4, 48 Stat. 1064, 1064.

¹⁵ The Advisory Committee members were Professors Thomas F. Green, Jr. (University of Georgia), Edward W. Cleary (Arizona State University), and Dean Charles W. Joiner (Wayne State University); Judges Simon E. Sobeloff (Maryland), Joe E. Estes (Texas), Robert Van Pelt (Nebraska), and Jack B. Weinstein (New York); attorneys Albert E. Jenner, Jr. (Chicago), David Berger (Philadelphia), Hicks Epton (Wewoka, Oklahoma), Egbert Haywood (Durham, North Carolina), Frank Raichle (Buffalo), Herman Selvin (Los Angeles), Craig Spangenberg (Cleveland), Edward Bennett Williams (Washington, D.C.); and Robert S. Erdahl of the Department of Justice. The Committee was assisted by Professors James W. Moore (Yale University) and Charles Alan Wright (University of Texas), and The Hon. Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference. Professor Cleary was the Committee's Reporter, and Mr. Jenner was its Chairman.

Practice and Procedure. In a letter attached to the preliminary draft, the Advisory Committee acknowledged the guidance provided by the American Law Institute Model Code of Evidence, Uniform Rules of Evidence, California Evidence Code, and New Jersey Rules of Evidence. Those rules ensured that the Advisory Committee didn't have to start from scratch.

After the initial draft, the legal community commented on the rules, and various changes were made. Those rules were sent to the Judicial Conference, which then sent them to the Supreme Court. Further changes were made to that draft, including many suggestions from the Justice Department.

In late 1972, the Supreme Court approved and sent to Congress the Federal Rules of Evidence for United States Courts and Magistrates, as proposed by the Advisory Committee. The Senate Select Committee on Watergate delayed enactment of the rules. Following comprehensive hearings, the rules were signed into law on January 2, 1975.¹⁶

In 1981, Senate Resolution 565 of the 67th Texas Legislature established an interim committee to "work with the Supreme Court of Texas, the Texas Judicial Council, and the Committee on Administration of Justice of the State Bar of Texas to study codification of the Texas rules of evidence."¹⁷ Lieutenant Governor Bill Hobby appointed Senators (and attorneys) Kent Caperton, Oscar Holcombe Mauzy, and Bob Glasgow to the committee.¹⁸ Chief Justice Joe Greenhill designated Justice Jim Wallace as the Supreme Court's member.¹⁹ Twenty members of the State Bar were appointed by immediate-past president Franklin Jones, Jr.²⁰ Three members of the Texas Judicial Council were also appointed to the committee.²¹ Fifteen practitioners of criminal law were appointed by State Bar President Wayne Fisher.²² The Model Code of Evidence for civil trials was promulgated by the Texas Supreme Court on November 23, 1982.²³

On January 17, 1983, Chief Justice Jack Pope delivered an address to the 68th Legislature.²⁴ In a section of his speech titled "Preparing for the End of the Century," Chief Justice Pope outlined work necessary for the creation of Texas rules of evidence.²⁵ Chief Justice Pope recommended similar rules for criminal cases, citing Court of Criminal Appeals Presiding Judge John F. Onion's reasoning that evidence rules would "avoid many reversals and retrials."²⁶

¹⁶ 28 U.S.C. § 2076 (1975).

¹⁷ "The State of the Judiciary Message, Delivered by Chief Justice Jack Pope, Supreme Court of Texas, to the Sixty-Eighth Legislature, January 17, 1983," <https://www.sll.texas.gov/assets/pdf/judiciary/state-of-the-judiciary-1983.pdf>.

¹⁸ *Ibid.* Mauzy served in the Texas Senate for twenty years and, in 1986, was elected to the first of two terms on the Texas Supreme Court.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ "State of the Judiciary Message." Beginning with the 66th Legislature in 1979, the Chief Justice of the Texas Supreme Court began making State of the Judiciary speeches.

²⁵ *Ibid.*

²⁶ *Ibid.* John Frank "Jack" Onion served as Presiding Judge of the Texas Court of Criminal Appeals from 1971 until 1988. See *Justices of Texas 1836–1986*, Tarlton Law Library, Jamail Center for Legal Research, <https://tarlton.law.utexas.edu/justices/profile/view/149>.



Chief Justice Jack Pope (Ret.), 1985. Photo courtesy Abilene Christian University.

Effective September 1, 1983, the Texas Supreme Court promulgated the Rules of Civil Evidence, repealing numerous statutory provisions and superseding some rules of civil procedure.²⁷ The original Texas rules were drafted to apply in both civil and criminal proceedings, but the final version only applied to civil matters.

Beginning in 1984, Texas courts made a series of amendments to the rules. On June 25, 1984, the Texas Supreme Court issued amendments effective November 1, 1984. Then, on November 10, 1986, further amendments were made, effective January 1, 1988. These changes included altering the title to the Texas Rules of Civil Evidence in order to distinguish the civil rules from the newly enacted criminal rules.

²⁷ *In the Supreme Court of Texas, Order*, 46 Tex. B.J. 196, 197-217 (1983); see also *New Rules of Evidence, Order*, 641 S.W.2d XXXV, LXVIII (Tex. 1982) (Court listed 39 statutes as repealed). The Rules of Evidence were developed after consultation and collaboration with Senator Kent Caperton, then chairman of the Senate Interim Committee on Rules of Evidence, and Erwin McGee, the Interior Study Committee's general counsel. *Ibid.*

In 1985, the Texas Legislature provided the Texas Court of Criminal Appeals with rulemaking authority related to evidence. On December 18, 1985, the Court of Criminal Appeals promulgated the Texas Rules of Criminal Evidence, effective September 1, 1986. The rules were again amended on June 26, 1990, effective September 1, 1990. In 2014, Rule 902(10) was amended.²⁸

In 1997, the Texas Supreme Court and the Court of Criminal Appeals ordered the adoption of uniform rules to become effective on March 1, 1998.²⁹ Although the rules are now unified, application of the rules is sometimes distinctive. For example, Rule 509 relates to the physician-patient privilege, which is unavailable in criminal cases.

In the early 1990s, Judge Robert Keeton, chair of the Standing Committee on Rules of Practice and Procedure, and Professor Wright proposed a redesign of the Federal Rules of Evidence. The purpose of the redesign was to “adopt clear and consistent style conventions.”³⁰

On March 10, 2015, the Texas Supreme Court approved the redesign of the Texas Rules of Evidence.³¹ This redesign attempted to remedy the fragmented amendments of the '80s and '90s. The updated rules, effective April 1, 2015, are easier on the eyes, thanks to the influence of Texas lawyer and lexicographer Bryan Garner and his exceptional style conventions.³² The Court made it clear that the amendments were “intended to be stylistic only.”³³ Substantive amendments were limited to Rules 511 and 613.³⁴

On February 16, 2016, the Texas Supreme Court and the Court of Criminal Appeals issued a joint order adopting amendments to Rule 615 concerning the production of witness statements in criminal cases.³⁵

Although Texas was not a leader in the development of the rules of evidence, Texans like Charles McCormick, Charles Alan Wright, Robert Keeton, and Bryan Garner have influenced the federal rules and inspired Texas rules that provide increased transparency to litigants. Evidence questions may remain “sands of the sea” making umpires necessary while evidence disputes remain, but the rules of evidence offer a playbook and guidance for the players and umpires.

²⁸ The Court invited public comments in Misc. Docket No. 14-9080 and the amendments were finally approved in Misc. Docket No. 14-9174.

²⁹ *In the Supreme Court of Texas and the Court of Criminal Appeals, Final Approval of Revisions to the Texas Rules of Evidence*, 61 TEX. B.J. 373, 374 (1998).

³⁰ Davison M. Douglas, Sidney A. Fitzwater, Daniel J. Capra, Robert A. Hinkle, Joseph Kimble, Joan N. Ericksen, Marilyn L. Huff, Reena A. Raggi, Geraldine Soat Brown, Edward H. Cooper, Kenneth S. Broun, Harris L. Hartz, Katharine Traylor Schaffzin, Roger C. Park, Deborah J. Merritt, Andrew D. Hurwitz, W. Jeremy Counsellor & Paula Hannaford-Agor, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1438 (2012).

³¹ The Court invited public comments in Misc. Docket No. 14-9232 and ordered final approval of the amendments in Misc. Docket No. 15-9048. The Texas Court of Criminal Appeals issued an analogous order on March 12, 2015.

³² See Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1996).

³³ Misc. Docket No. 14-9232, Order Adopting Amendments to the Rules of Evidence, available at https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal2&Template=/CM/ContentDisplay.cfm&ContentID=27715.

³⁴ *Ibid.*

³⁵ Misc. Docket No. 16-9012 finally approved this amendment, which is necessary following enactment of the Michael Morton Act.

This page and the next: Order of October 20, 1997.
Courtesy of Blake Hawthorne, Clerk of the Supreme Court of Texas.

IN THE SUPREME COURT OF TEXAS

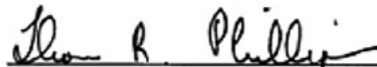
Misc. Docket No. 97-~~9184~~

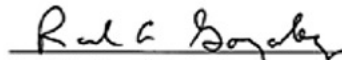
APPROVAL OF REVISIONS TO THE TEXAS RULES OF CIVIL EVIDENCE

ORDERED that:

1. The Texas Rules of Civil Evidence are amended as follows;
2. These amendments, with any changes made after public comments are received, take effect March 1, 1998;
3. The notes and comments appended to these changes are incomplete, are included only for the convenience of the bench and bar, and are not a part of the rules; and
4. The Clerk is directed to file a copy of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

SIGNED AND ENTERED this 20th day of October, 1997.


Thomas R. Phillips, Chief Justice


Raul A. Gonzalez, Justice


Nathan L. Hecht, Justice

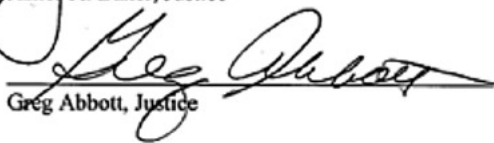
John Cornyn, Justice


Craig T. Enoch, Justice


Rose Spector, Justice


Priscilla R. Owen, Justice


James A. Baker, Justice


Greg Abbott, Justice

Misc. Docket No. 97 - 9984 Page 2 of 2



RACHEL PALMER HOOPER, a former prosecutor and trial attorney in the Harris County District Attorney's Office, is an associate in Baker Hostetler's Houston office with a focus on civil and complex commercial litigation.

[Return to Journal Index](#)

Theodora Hemphill's Guide to the Texas Constitution

• Part IV •

By David A. Furlow

The story of Theodora Hemphill and the Texas Constitution reaches its final chapter. This four-part article has examined the impact of Texas's changing constitutions on Theodora Hemphill, the older daughter of Texas Supreme Court Chief Justice John Hemphill. In Part I, we saw how the 1845 Constitution made a slave of Theodora because her mother was Hemphill's enslaved consort, Sabina. To emancipate his daughter Theodora, that 1845 Constitution compelled then-Senator John Hemphill to exile his twelve-year-old daughter Theodora to Ohio's Wilberforce University so she could receive an education and end her status as a slave.

In Part II, we examined how Texas's Secession and adoption of the 1861 Constitution ushered Texas into the Confederacy. In response to Texas's Secession, John Hemphill's Unionist colleagues expelled him from the U.S. Senate. When he went to Richmond, Virginia in service to the Stars and Bars, Texas's 1861 Constitution barred father Hemphill from emancipating any of his slaves, including his own daughters Theodora and Henrietta. John Hemphill died of malaria and liver disease in Richmond in early 1862, leaving his daughters free to fashion their own young lives while the Civil War tore their nation apart. Henrietta died of consumption (tuberculosis) in Ohio's cold climate, but Theodora survived the war.

In Part III, we saw how Texas's 1876 Constitution and the "Redeemer" Texas Supreme Court segregated, sidelined, and subordinated Theodora to second-class status based on her race and sex.

In this final part of Theodora's story, we'll watch Theodora declare her independence from the disabilities, discrimination, and disparagement that Jim Crow-era Texas meted out to African-American women. Unwilling to allow others to define her, Theodora made herself the master of her own fate, carving an independent path and challenging the status quo in her own ways as an independent businesswoman in late nineteenth century Austin. Theodora's life sheds new light on the influences and dilemmas that shaped the lives and livelihoods of John Hemphill, his older daughter Theodora, and other nineteenth century Texans.

In the Jim Crow era, Theodora declared her independence from Texas law.

By the late 1870s, Theodora was an orphaned young woman growing up alone in a world shaped by prejudice against her. Unable to vote and presumed by Victorian society to be unable to manage her own affairs because of her sex, she faced growing Jim Crow discrimination because of her mixed race. Soon after the end of Reconstruction in Texas, Theodora began to

tread a path remarkably unconventional for a Texas Supreme Court Chief Justice's daughter. Unlike the vast majority of African-American Texas women of the era, she did not live in the rural countryside. She lived in the capital city, she had an education, and she possessed a sizable settlement from her intervention in her father's wealthy probate estate.

After disappearing from the historical record for a few years after receiving her settlement in 1872, Theodora went into business for herself in Austin. She combined a Wilberforce University education with innate intelligence and an enterprising spirit to open the Blue Light, an establishment that offered food, alcohol, tobacco, entertainment, and personal services to upscale customers, and the Mahogany Hall, an enterprise that catered to African-American clientele. In an age when residential directories used "(c)" to characterize residents as "colored," *Morrison & Fourmy's General Directory of the City of Austin, 1885-86* listed Theodora as providing rooms for as many as five other women who worked at her female boardinghouse¹ in Austin's "Guy Town" district.²

Guy Town, whose boundaries now encompass Austin City Limits and the Warehouse District, was late nineteenth century Austin's Whorehouse District.³ Bordered by Town Lake and Guadalupe, Colorado, and Fifth Streets, the area appeared as the First Ward on maps of Austin.⁴

Similar vice districts and their "gilded palaces of sin" existed in Texas's other cities and towns: the ten-block "Sporting District" in San Antonio, the state's oldest den of prostitution, with more than one hundred such establishments; the Post Office Street area in Galveston, the next oldest; "Happy Hollow" in Houston; Dallas's "Frogtown" and "Boggy Bayou"; "Hell's Half Acre" in Fort Worth; El Paso's "Utah Street" district; the "Reservation" in Waco, a/k/a "Two Street"; Denison's "Skiddy Row"; and Canadian's "Hogtown" in the Panhandle, among others.⁵

¹ While a good wife "kept house" in Victorian times, a madam kept "a house." Squeamish Victorians used the delicate term "female boardinghouse" to refer to a building also known as a bawdy house, bordello, brothel, disorderly house, or "house of assignations," and the vulgar described it in plain English as a "whorehouse." See James Pylant and Sherri Knight, *The Oldest Profession in Texas: Waco's Legal Red Light District* (Stephenville, TX: Jacobus Books, 2011), 1; see, e.g., "The Bayou City Budget: Interesting Items of Local News," *Galveston Daily News*, vol. 45, no. 319, ed. 1, Friday, March 11, 1887, <http://texashistory.unt.edu/ark:/67531/metaph461659/>. ("For several days past Sheriff Ellis's force has been busily engaging in arresting parties indicted by the last grand jury for violations of the gaming, occupation, and *bawdy-house* laws.") (Emphasis supplied.)

² *Morrison & Fourmy's General Directory of the City of Austin, 1885-86* (Austin: Morrison & Fourmy, 1885), 7, 124, <http://texashistory.unt.edu/ark:/67531/metaph46837/> ("Hemphill, Theodora (c), r. [resides] 309 W. Live Oak"); 146 ("Leslie Lizzie (c), bds [boards with] Theodora Hemphill"); 172, ("Peak Lee (c) bds Theodora Hemphill"); 215 ("Walker Essie (c) bds [boards with] Theodora Hemphill"); 224 ("Winters Stella (c), bds Theodora Hemphill").

³ Ian Quigley, "The Fantastic and Utterly Disreputable History of the Bevy of Sin Known as Guy Town: Before It Was the Warehouse District, It Was the Whorehouse District," *Austin Chronicle*, January 26, 2001. See also Richard Zelade, *Guy Town by Gaslight: A History of Vice in Austin's First Ward* (Charleston, NC: Arcadia Pub., 2014), 29, 33.

⁴ See Austin's *Daily Democratic Statesman*, January 24, 1887, quoted by David C. Humphrey, "Prostitution and Public Policy in Austin, Texas, 1870-1915," in Texas State Historical Association, *Southwestern Historical Quarterly* 86 (April 1983): 488, <http://texashistory.unt.edu/ark:/67531/metaph101409/>.

⁵ Zelade, *Guy Town*, 25; Pylant and Knight, *Oldest Profession in Texas*, 2-3; David C. Humphrey, "Prostitution," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/jbp01>; Richard F. Selcer, "Fort Worth and the Fraternity of Strange Women," *Southwestern Historical Quarterly*, 96 (July 1992), 55; J. Lee Butts, *Texas Bad Girls: Hussies, Harlots, and Horse Thieves* (Plano: Republic of Texas Press, 2001), 25-32; Jan Johnson, "Galveston in the Good Old Days: Infamous Postoffice Street," <http://www.twistedparrot.com/prostitutionpart1.htm>; Canadian Chamber of Commerce, "Canadian, Texas History," <http://www.canadiantx.org/index.php/history.html>.

Similar districts existed in America's cities from the East Coast to Alaska,⁶ but particularly along America's western frontier, where men sometimes outnumbered women one hundred to one.⁷

According to historian David Humphrey, "[p]rostitution was not even a serious social problem [in Texas] until after the Civil War when the cattle drivers brought boom times to towns like San Antonio, Fort Worth, Waco, Austin and Fort Griffin."⁸ Prostitution followed the Union Army into Texas, first in Galveston in 1865, then in Austin and elsewhere; it expanded in response to the arrival of cowboys, broadened as the Houston and Texas Central Railroad's workers came to town, reacted to the needs of legislators, and grew still larger as construction crews came to work on the new granite Capitol between 1882 and 1888.⁹ As many as one out of four females on the western frontier may have resorted to prostitution, while the number of prostitutes in the Austin area fluctuated between one hundred and two hundred.¹⁰

Ironically, the name her father gave Theodora, "Gift of God," foreshadowed her future. The most famous *Theodora* was the Emperor Justinian's wife. The Byzantine historians John of Ephesus and Procopius described how their ambitious empress Theodora first found employment in a Constantinople cathouse catering to low-status customers, then performed stage routines involving indecent exposure, sold sexual services off-stage, and eventually seduced the emperor into marrying her.¹¹

Theodora's female-managed boardinghouse in Guy Town offers an opportunity to examine the origins of some important Texas Supreme Court case law regulating morality. Mid-nineteenth century Texas was a libertarian social experiment that ended in the enactment of statutes, regulatory agencies, and Sexually Oriented Business ordinances governing prostitution, cabarets, dancehalls, massage parlors, and modeling studios; laws regulating casino gambling;

⁶ See, e.g., Richard Zacks, *Island of Vice: Theodore Roosevelt's Doomed Quest to Clean Up Sin-Loving New York* (New York: Doubleday, 2012), 1–24; Karen Abbott, *Sin in the Second City: Madams, Ministers, Playboys, and the Battle for America's Soul* (New York: Random House, 2007); Lael Morgan, *Good Time Girls of the Alaska-Yukon Gold Rush* (Vancouver and New York: Whitecap Books, 1998). See also Alecia P. Long, *The Great Southern Babylon: Sex, Race, and Respectability in New Orleans, 1865–1920* (Baton Rouge: Louisiana State University Press, 2004), 10–59.

⁷ Pylant and Knight, *Oldest Profession in Texas*, 2 and 321, n.5; "Outlaws and Other Wild Women of the West," *Abilene Reporter-News*, June 18, 1995.

⁸ Humphrey, "Prostitution and Public Policy," 474; Pylant and Knight, *Oldest Profession in Texas*, 2 and 322, n.12, quoting Selcer, "Fort Worth."

⁹ Humphrey, "Prostitution and Public Policy," 474–77, 495, and 495 nn.43–44; Zelade, *Guy Town*. The author thanks the Texas State Preservation Board Curator of the Capitol Ali James for the use of her chronology of Austin events from her PowerPoint presentation for the Texas General Land Office's Sixth Annual Save Texas History symposium on November 14, 2015.

¹⁰ Jay Moynahan, *Remedies from the Red Lights: Cures, Treatments and Medicines* (Spokane, WA: Chickadee Publishing, 2000), 11, cited in Pylant and Knight, *Oldest Profession in Texas*, 2 and 322 n.29.

¹¹ Claudine M. Dauphin, "Brothels, Baths and Babes: Prostitution in the Byzantine Holy Land," *Classics Ireland* 3, (1996): 47, 72; Procopius of Caesarea, *The Secret History*, translated by Richard Atwater (Chicago: P. Covici, 1927; New York: Covici Friede, 1927, reprinted, Ann Arbor, MI: University of Michigan Press, 1961), 9, <http://legacy.fordham.edu/halsall/basis/procop-anec.asp> ("Now Theodora was still too young to know the normal relation of man with maid, but consented to the unnatural violence of villainous slaves...in a brothel....But as soon as she arrived at the age of youth... her mother put her on the stage. Forthwith, she became a courtesan...who gave her youth to anyone she met....Often she would go picnicking with ten young men or more...and dallied with them all, the whole night through."). Even if these Byzantine histories are nothing but misogynous lies, the name Theodora carried connotations Chief Justice Hemphill, a classically-trained scholar, failed to consider.

and statutes restricting the sale and consumption of alcohol and drugs.¹²

The name “Guy Town” first appeared in print on March 13, 1880, when Austin’s *Daily Democratic Statesman*, a forerunner of the *Austin American-Statesman*, referred to it by that name in an article.¹³ The same low-income, low-rent part of Austin was first known as Ebron, Ebron Yard, or Ebronville (circa 1870); Five Points (circa 1870); Mexico (from 1875 to 1895); Cooneyville, after fandango-entrepreneur “Mexican Charlie” Cunio (1875 to 1895); and the First Ward.¹⁴ By 1876, Guy Town was a place where the ideals of Victorian-era deportment did not apply. On May 5, 1876, for example, the *Statesman* reported that, “Two women charged by the city with keeping disorderly houses [brothels, a/k/a bawdy houses] threatened to tell who [were] their most frequent visitors and several high-toned gentlemen [were] trembling in their boots.”¹⁵

If Austin’s gentlemen quaked in their boots, it was because visits to Guy Town had to remain secret from wives, children, and ministers, not because Guy Town itself was a secret. Austin’s “Tenderloin” and “Mexico” district was well known to cowboys, laborers, legislators, city employees, merchants, bankers, and, beginning in 1883–84, as many as one hundred students a night of the recently-opened University of Texas.¹⁶ In the January 1877 Mayor’s Court jury trial of thirty-seven-year-old Guy Town resident Fanny Kelley for running a bawdy house, a thick-witted City Prosecutor asked Austin Police Department Officer Sheehan to identify the location of Fanny’s illegal business. “Yerself and every man on that jury know as well as meself where Fanny Kelley’s is,” the Irish-born lawman answered, “and ye’ve all been thar often!”¹⁷

In 1880, at least 177 prostitutes dwelled amongst Austin’s 11,013 people.¹⁸ Austin’s “soiled doves” were a diverse group, most of whom lived in Guy Town, a/k/a the First Ward, the most ethnically and racially diverse part of nineteenth century Austin.¹⁹ An 1875 Austin census identified the entire First Ward population (not just the prostitutes) of some 200 “Mexicans,” 250 “Coloreds,” 150 “Whites” (Anglos), 16 Chinese, and dozens of Germans, Scots, French, Poles, Swedes, “Israelites,” “Arabs,” and “Turks.”²⁰ Historian David Humphrey states that “half or more of [Austin’s] prostitutes during the 1880s and 1890s were white, most of them born in the United States, while about 40 percent were blacks and some 7 percent Hispanics.”²¹ By the 1880s, more than one hundred saloons clustered within Guy Town’s red light district, along with many gambling casinos, boarding houses, breweries, and brothels.²²

¹² The organizers of the Texas General Land Office’s Sixth Annual Saving Texas History symposium, “In the Shadow of the Dome: Austin by Day and Night” (November 14, 2015) were unafraid to examine this always-controversial aspect of Texas history during one of the State’s best history conferences. Austin writer Richard Zelade, author of *Guy Town by Gaslight*, told colorful tales of Guy Town’s history.

¹³ Zelade, *Guy Town*, 33.

¹⁴ *Ibid.*, 29.

¹⁵ Feit, et al., 23.

¹⁶ Humphrey, “Prostitution and Public Policy,” 475, 495 (referencing University of Texas students).

¹⁷ *Ibid.*, 473; Pylant and Knight, *The Oldest Profession*, 3 and 322, n.16.

¹⁸ Selcer, “Fort Worth,” 57.

¹⁹ Zelade, *Guy Town*, 13.

²⁰ *Ibid.*

²¹ Humphrey, “Prostitution,” *Handbook of Texas Online*.

²² Feit, et al., *Boarding Houses*, 23.

Women such as Theodora Hemphill joined the world's oldest profession in 1880s-era Guy Town for many reasons. As James Pylant and Sherry Knight observed in their study of prostitution in Waco's legally-recognized red light district,

Economics played a vital role in a woman's decision to turn to the skin trade. Most women had very limited educational opportunities, most having become brides while still in their teens. Divorced or abandoned housewives learned that they either had to quickly remarry, make their homes with relatives, or find work at a time when employment options for females were limited. Whether toiling as domestic servant, seamstress, laundress, or day laborer, a woman could not expect much more than one to three dollars per week. Yet a woman walking the streets could earn \$10 per week.²³

Women usually joined the demimonde world out of necessity, often to feed, clothe, and shelter themselves or their children.²⁴

At a time when the legal age of consent in Texas was ten (until 1887, when legislators raised it to twelve), young women deemed "fallen" because they had lost their virginity, even as a result of incest or rape, sometimes became prostitutes because they were already deemed to be "ruined" and unmarriageable.²⁵ When rape and seduction cases were decided by all-male juries frequently swayed by defense-friendly witnesses willing to testify that a girl had been intimate with other men, prostitution offered "the only place open to fallen women" to earn a living.²⁶ For others such as Calamity Jane, Belle Starr, and "Sundance Kid" Harry Longabough's beautiful girlfriend Etta Place, the life overcame outmoded social restrictions that impeded a woman's freedom and offered an opportunity to meet men (bad boys) capable of buying, or taking, what they wanted, including railway company safes filled with other people's money.²⁷

Sometime around 1882, Theodora Hemphill (then sometimes known also as "Theo") opened the, an entertainment business, perhaps using the probate-settlement gold she received from her white Hemphill family relatives in 1872. She purchased a large house at 309 West Oak (now West Second Street) between Fourth and Fifth Avenues, betwixt Lavaca and Guadalupe Streets. Travis County deed records show that the house cost \$3,758.50, a huge sum for the time. Theodora paid H.A. and J. G. Fitzhugh for that house in \$50 a month installments.²⁸ From time to time, Theodora lived at 307 West Second Street, in later years the home of Austin's City Council, and at 306 West Fourth Street.²⁹

²³ Pylant and Knight, *Oldest Profession in Texas*, 5 and 322 n.28; Elizabeth A. Topping, *What's a Poor Girl to Do? Prostitution in Mid-Nineteenth Century America* (Gettysburg: Thomas Publications, 2001), 14–20; Moynahan, *Remedies from the Red Lights*, 63.

²⁴ Pylant and Knight, *Oldest Profession in Texas*, 202–3 (describing the desperation that drove Maude Elizabeth Bates to leave the Hill County and become a scarlet woman) and 228–44 (describing the lives of "Sisters of Color").

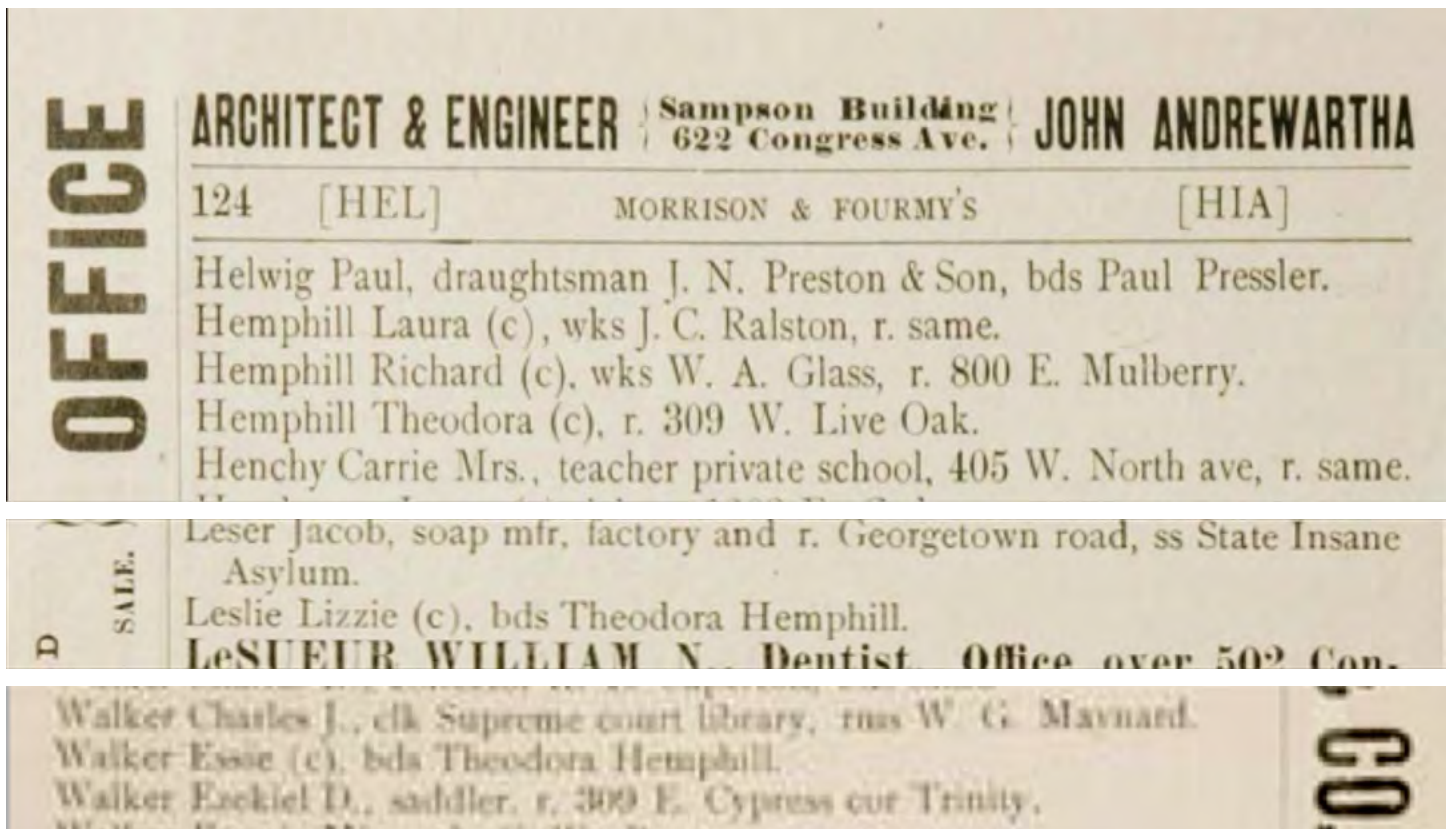
²⁵ *Ibid.*, 4.

²⁶ *The Purity Journal*, II, no. 2 (August 1905): 12, quoted in Pylant and Knight, *Oldest Profession in Texas*, 3–4 and 322 n.21.

²⁷ Butts, *Texas Bad Girls*, 33–42 and 103–15.

²⁸ *Morrison & Fourmy's General Directory; Travis County Deed Records*, vol. 82, 527; vol. 87, 150; vol. 126, 371; vol. 82, 527. The "Live Oak" of 1882 is now known as Second Street.

²⁹ Feit et al., *Boarding Houses*, 23, and Block 3, Lots 9 and 10.



Top, Morrison & Fourmy's General Directory of Austin (1885), page 124 (Theodora Hemphill)
 Middle, page 146, and bottom, page 215.³⁰

In 1883, Austin's city fathers won the State's approval to amend the municipal charter. Instead of operating under a charter that authorized the mayor and police only to "suppress bawdy houses" rather than regulate them, the amended charter permitted city officials to "restrain" their operation by, *inter alia*, restricting them to certain parts of town, e.g., to Guy Town.³¹ Austin police compiled lists of bawdy houses, their madams, and the prostitutes who worked there, reflecting an intent to regulate rather than prohibit prostitution.³²

Theodora's principal business, the Blue Light, soon became well-known, as did her second establishment, Mahogany Hall, among its African-American clientele. In each instance, Theodora was the madam; she charged Austin men for love's comforts without marriage's constraints.³³ As fiercely independent as her father, she insisted on maintaining sole management of her

³⁰ Morrison & Fourmy, *Morrison & Fourmy's General Directory of the City of Austin, 1885-86* (1885), texashistory.unt.edu/ark:/67531/metaph46837/, University of North Texas Libraries, Portal to Texas History, texashistory.unt.edu; crediting Austin History Center, Austin Public Library.

³¹ Humphrey, "Prostitution and Public Policy," 484.

³² *Ibid.*, 484-86.

³³ The name *Blue Light* implied that Theodora was operating an upper-class establishment while *Mahogany Hall* celebrated African-American culture. A "Blue Light" district served officers and business men, while "Red Light" prostitutes sold their services to working men or, in war-time, noncommissioned soldiers. See John Lichfield, "Inside the brothels that served the Western Front: How one First World War soldier found love in the arms of a French sweetheart," *Independent* (Aug. 3, 2014), <http://www.independent.co.uk/news/world/world-history/inside-the-brothels-that-served-the-western-front-how-one-first-world-war-soldier-found-love-in-the-arms-of-a-french-sweetheart-9643738.html>). See generally Karen Sharpe, *Red Light, Blue Light: Prostitutes, Punters and the Police* (Aldershot, UK: Ashgate Pub., 1998).

business. In 1939, an Austin man recalled that, "I do not know of Theodora ever having a man or what we would call lover."³⁴ In short, Theodora never depended on a pimp or procurer. Born a slave, she made herself the master of her fate.

Theodora and other Guy Town prostitutes interacted with legislators, businessmen, city council members, and, in all probability, other members of state government.³⁵ In addition to proffering women's bodies, establishments such as the Blue Light offered poker, roulette, and other games of chance; live and player piano music; fine Havana cigars; and cheap tobacco a cowboy could roll for himself.³⁶ Laudanum, an opiate, and other then-legal drugs were often available.³⁷ There was never a shortage of fare, fine or plain, depending on a client's taste and wallet, while beer, wine, and champagne flowed, just as the money did.

Theodora had to have courage, tenacity, savvy, and smarts to run the Blue Light for twelve years in Victorian Austin. As David C. Humphrey observed in his study of Guy Town prostitution,

Regardless of ethnicity, the life of Texas prostitutes was hard. Though prostitution paid better than most jobs open to women, few prostitutes prospered. Most were poor or not far from it, owned little personal property, and were beset by the ever-present threats of violence, venereal disease, and harassment by city officials. Many prostitutes used such drugs as opium, morphine, and cocaine, not uncommonly to commit suicide.³⁸

Theodora faced criminal prosecution every day she opened her establishment to customers.

One of Austin's first quasi-judicial records, Travis County District Court Minute Book C (1850–1853), includes a mid-nineteenth century prosecution for "keeping a disorderly house."³⁹ Although neither Texas's early Congress nor the Lone Star State's Legislature banned the sale of sex for money, Article 396 of the Legislature's Penal Code of 1856 outlawed the keeping of a "disorderly house," defined as a house "kept for the purpose of public prostitution, or as a common resort for prostitutes, vagabonds or free negroes."⁴⁰ Mid-nineteenth century racism permeated Texas's first prohibition against prostitution. Sometimes, racism led local authorities to enforce anti-prostitution laws against houses that catered to African-Americans while leaving white establishments open.⁴¹

³⁴ Statement of J. E. Grizzard, 805 W. 21st St., Austin, Texas, March 31, 1939.

³⁵ Rachel Feit, "Guy Town," *Texas Beyond History*, <http://www.texasbeyondhistory.net/guytown/>.

³⁶ Archaeologists at Hicks & Company, an environmental consulting company, excavated a four-block area of Guy Town. The Gilded Age artifacts excavated there include hundreds of beer, wine, and whisky bottles, crystalline goblets, dice, bar tokens, and intimate items that bring the Blue Light's world to life.

³⁷ Rachel Feit, "Guy Town."

³⁸ Humphrey, "Prostitution"; Pylant and Knight, *Oldest Profession*, 202–11.

³⁹ Hon. Thomas R. Phillips, *Justice in the New State Capital*, 75 TEX. B.J. 195 (March 2012).

⁴⁰ See Act of Feb. 12, 1858, 7th Leg., R.S., ch. 121, reprinted in 4 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1028, 1037 (Austin, Gammel Book Co. 1898). Austin's City Council first banned the operation of disorderly houses on June 1870 when it prohibited "fandangoes or dance house[s] where lewd women or persons who have no visible means of support are admitted." An amended ordinance in 1874 made it illegal to keep "a bawdy house, a house of ill-fame; or house of assignation."

⁴¹ Humphrey, "Prostitution and Public Policy."

Although it was the capital, Austin was still a small town with a total population of some 11,013 people in 1880.⁴² It is possible that one or more justices of the Texas Supreme Court, or members of its staff, knew that Theodora, the oldest daughter of Chief Justice Hemphill, was a “soiled dove” working in Austin. That might account for the humanity evident in Justice Micajah H. Bonner’s decision for the Court in *Milliken v. City of Weatherford*,⁴³ a case involving review of a municipal ordinance “to suppress houses and places of prostitution within the city limits” that sought to deny prostitutes the right to reside in town. The ordinance read:

[A]ny prostitute or lewd woman who shall reside in, stay at or inhabit any room, house or place within the limits of this city, or any person who shall knowingly furnish, rent, let or lease any premises or place within the city limits to any prostitute or lewd woman...shall be deemed guilty of an offense [punishable by a fine of up to two hundred dollars].⁴⁴

Milliken was no demimonde but Weatherford’s mayor, James H. Milliken.

A majority of Weatherford’s aldermen, acting as a court, dismissed Milliken as the town’s “duly elected, qualified, acting” mayor for renting a house to a *nymph du pare* in violation of the municipality’s anti-prostitution ordinance.⁴⁵ Milliken responded by filing a quo warranto petition to obtain mandamus relief restoring him to the position of municipal power from which, he asserted, he had been unlawfully ousted.⁴⁶

Mayor Milliken sought redress in response to the efforts of Weatherford’s aldermen to hold him responsible for aiding and abetting crime by renting a “house” to a prostitute. Municipal leaders in Austin had already made a name for themselves by holding the wealthy and powerful responsible, as well as working girls, for running bawdy houses. As Austin historian Richard Zelade observed in *Guy Town by Gaslight*,

January 17, 1877, was a cold, damp and dreary day, but it was both an interesting and profitable one at the Mayor’s Court. The day before, sixty-one complaints were issued against parties violating various ordinances. From the character of the prisoners arraigned before him, it appeared that a moral era was at last to be inaugurated in Austin. Some twenty or thirty of the frailest, if not the fairest, were there on the charge of plying an avocation detrimental to the grand moral standing of Texas’s capital city...⁴⁷

The capital city’s municipal government did not end only by punishing prostitutes, however.

Austin’s law enforcement authorities charged wealthy and powerful men, like Weatherford’s Mayor Milliken, of violating the law by renting houses to local women of the Cyprian profession

⁴² Selcer, “Fort Worth,” 57.

⁴³ 54 Tex. 388, 393 (1881).

⁴⁴ *Ibid.*, 393.

⁴⁵ *Ibid.*, 389.

⁴⁶ *Ibid.*, 389–90.

⁴⁷ Zelade, *Guy Town*, 144.

who then paid their rent by making them “houses” of infamy. Richard Zelade notes that,

[T]his financial pass at principals in depravity was too full of success, at least in a financial point of view, to allow accessories, innocent though some might be, to go scot-free. Accordingly, prominent men and others not named by the *Statesman* were brought up on the charge of renting houses to women of ill repute. One excellent gentleman, full of piety and noted as a great moral teacher, then and there learned for the first time that he had wronged society on the question of rents. This good man protested innocence and, disgusted with his own loose ways of driving a trade, pleaded guilty and hushed the matter up with fines and costs.⁴⁸

Victorian era moral crusaders were no longer limiting their targets to poor street-walking women but had taken careful aim at men of wealth, taste, and capital. To protect their interests in property, wealthy men turned to the courts.

In November of 1880, a majority of Weatherford’s aldermen deprived Mayor Milliken of his office as a “duly elected, qualified, acting” mayor. Milliken sought expedited, quo warranto and mandamus relief from the aldermen’s official oppression. The mayor lost his case in a district court bench trial, but prosecuted a mandamus action to the Texas Supreme Court based on an agreed statement of facts and a legal challenge seeking a reversal and rendition to preserve and protect his substantive constitutional rights.⁴⁹ The Texas Supreme Court granted Mayor Milliken’s petition and issued its opinion on March 11, 1881, four months after the mayor’s removal from office.⁵⁰

Justice Bonner’s opinion for the Texas Supreme Court showed surprising sympathy for soiled doves left with no choice but to pursue a path of prostitution:

Although we most heartily approve the desire of the city council that dens and haunts of prostitution, “going down to the chambers of death,” shall be prohibited and suppressed; and that their inmates shall not be permitted to ply their nefarious traffic in the property, reputation and souls of fellow beings, within the limits of the city, yet we are of opinion that the alleged offense in this case did not embrace such act which the council, under our constitution and laws, had the power to make penal.

That unfortunate and degraded class against whom the ordinance was mainly intended, however far they may have fallen beneath the true mission of women,... are still human beings, entitled to shelter and the protection of the law; and the [city] council did not have the power to so far proscribe them as a class, as to make it a penal offense in any one to rent them a habitation without regard to its use.⁵¹

As a result, “[s]uch an ordinance is null and void, because unreasonable and in contravention of

⁴⁸ *Ibid.*, 144.

⁴⁹ *Milliken*, 54 Tex. at 395.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, 393–94.

common right” under Article I, Sections 19 and 20 of the Texas Constitution of 1876.⁵²

The Court refused to make prostitution a status offense or to deny fallen women the right to live within Texas’s towns and cities as a matter of substantive due process. Since Weatherford’s ordinance was unconstitutional, the removal of Mayor Milliken by a majority of alderman was an unconstitutional violation of due process rights. The legal principle is not arcane, but cutting-edge case law, as important today as in 1881. The Texas Supreme Court cited *Milliken* in 2015 in *Patel v. Texas Department of Licensing & Regulation* to invalidate a substantively unreasonable statewide regulation on eyebrow threading.⁵³

University of Texas Law School Professor Hans W. Baade noted that the tenor of Justice Bonner’s reasoning was “quite out of tune with the restrained, precise style” he usually brought to the Court.⁵⁴ Judicial historian James Haley noted that, “[m]odern requirements for sex-offender registry and proscriptions from residency place the nineteenth century in the unusual posture of having been more compassionate in this regard than the twenty-first.”⁵⁵ Perhaps Justice Bonner wrote in an unrestrained manner to avoid putting former Chief Justice Hemphill’s daughter Theodora onto the capital’s streets without hope, hearth, or home.

Other state supreme courts followed Texas’s lead. In *State v. Ashe*,⁵⁶ North Carolina’s court relied on *Milliken* in striking down a conviction under a “lewd woman” municipal ordinance that “makes it unlawful for any lewd woman, regardless of her purpose, to appear upon the public streets, or in any public building, store, shop, or other place of business, within the town of Murphy.” Chief Justice Stacy opined, “We think not,” and cited Texas precedent:

To deny to anyone, not lawfully imprisoned, the right to travel the highways, to buy goods, to eat bread, to attend Divine Worship, and the like, simply because he or she happens, for the time being, to belong to an unfortunate class, is an unwarranted use of the police power. 19 R. C. L., 845. Such an attempt at discrimination is unreasonable and in contravention of common right. *Milliken v. City Council*, 54 Tex. 388, 38 Am. Rep., 629.⁵⁷

Other courts cited *Milliken* for an altogether different proposition: that mandamus is the proper action to restore an officer to his office when he, having the actual possession and undisputed

⁵² *Ibid.*

⁵³ 469 S.W.3d 69, 87 and 124 (Tex. 2015) (Majority and Concurring Opinions, respectively).

⁵⁴ Hans W. Baade, “Chapters in the History of the Supreme Court of Texas: Reconstruction and ‘Redemption’ (1866–1882),” *St. Mary’s Law Journal* 40, no. 1 (2008): 17, 174.

⁵⁵ Haley, *Texas Supreme Court*, 98 and 273 n.43.

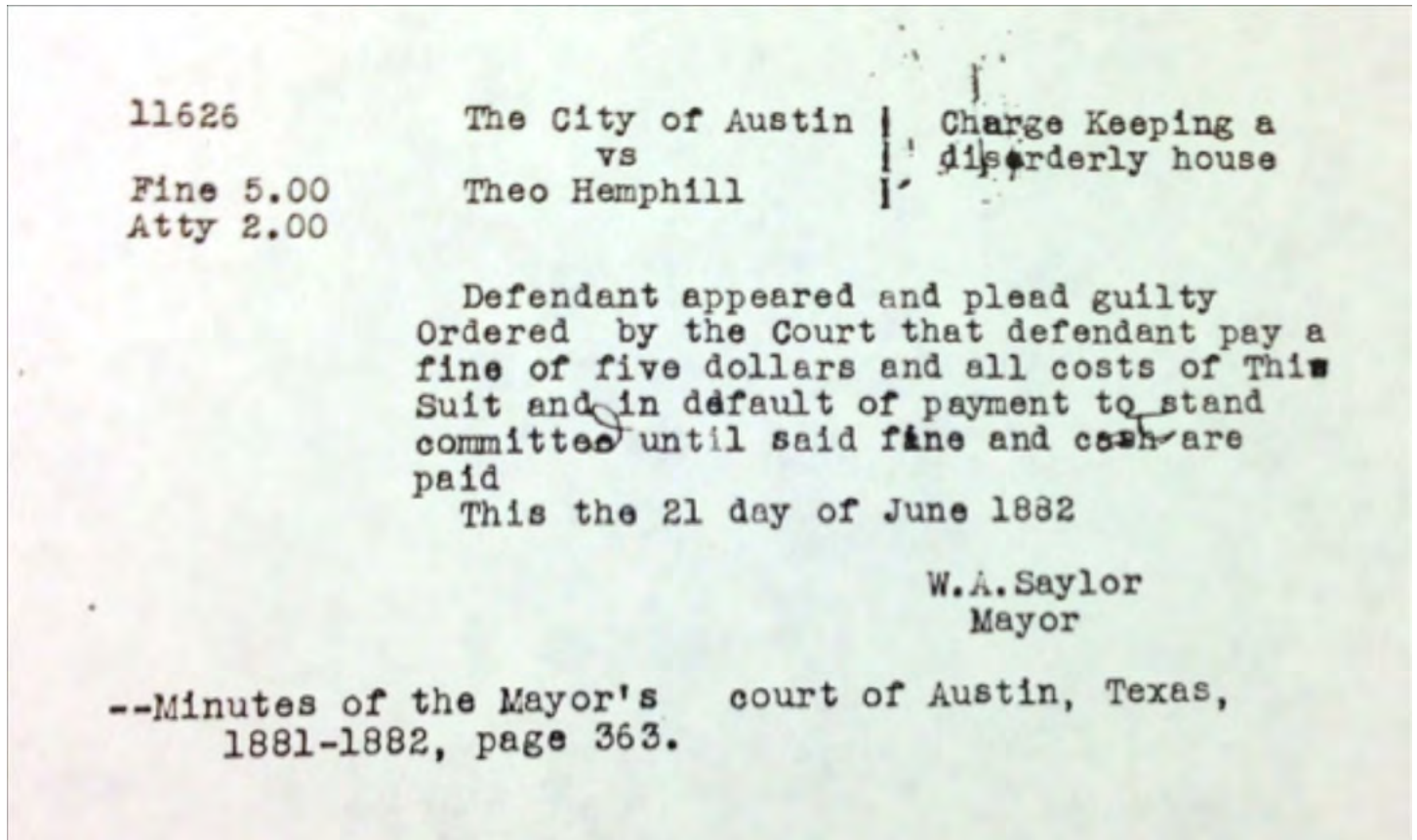
⁵⁶ 202 N.C. 75; 161 S.E. 709 (1932).

⁵⁷ *Ibid.*, 202 N.C. at 76; 161 S.E. at 709. See also *Buell v. State*, [No number in original] 45 Ark. 336, 338; 1885 Ark. LEXIS 66 (1885) (ruling that a town council has no power to make it a misdemeanor for a prostitute to reside within town limits because “the right to live in a given community is a common right, of which a person cannot be deprived, however degraded and subversive of good morals his occupation may be. *Milliken v. City Council*, 54 Tex. 388; S. C., 38. *Amer. Rep.*, 629.”); *City of Bessemer v. Eidge*, 162 Ala. 201, 207; 50 So. 270, 272 (1909) (citing *Milliken* and invalidating, in a habeas corpus case, an ordinance barring the keeping of intoxicating liquor in any place, public or private).

right to the same, is illegally ousted therefrom, whether by removal or suspension.⁵⁸

On June 21, 1882, Theodora paid the price for transgressing the law against operating a bawdy house. That was the day Theodora responded to a summons from Austin Mayor W. A. Saylor's court to stand trial. The City accused her of "keeping a disorderly house" in *City of Austin, Plaintiff v. Theo Hemphill, Defendant*.⁵⁹ She experienced Mayor Saylor's crackdown on Austin's vice district. "During the years 1880-1881, the [Austin] police arrested about one hundred virtue venders, as compared with about two dozen from 1876 through 1879."⁶⁰

Theodora appeared in the Mayor's Court, rose from her seat, took responsibility for the establishment she ran, and pled guilty. The Mayor's Court found her guilty, imposed a \$5 fine, ordered her to pay court costs, and refused to release her until she paid.



Record of proceedings in *The City of Austin v. Theo Hemphill* prosecution. Mary Smith Fay Collection, Clayton Genealogical Library, Houston, Texas.

The enactment of the Fourteenth Amendment invalidated state statutes expressly aimed at "free negroes," but did nothing to limit cities from enforcing bawdy house restrictions more frequently against blacks than other residents of Guy Town.

⁵⁸ *Metsker v. Neally*, 41 Kan. 122, 125; 21 P. 206, 207 (1889).

⁵⁹ *City of Austin, Plaintiff v. Theo Hemphill, Defendant*, No. 11626, in the Mayor's Court of Austin Texas, 1881-1882, 363, No. 10415 Indictment (March 22, 1894), Minutes of the Travis County Criminal District Court, Volume D, 363.

⁶⁰ Zelade, *Guy Town*, 40.

Twelve years later, on March 22, 1894, another Austin grand jury, this time in a district court, indicted Theodora again for keeping a “disorderly house,” in *City of Austin v. Theo Hemphill*.⁶¹ Two days later, the district court sua sponte transferred the case to a Travis County justice court.⁶² Knowing that a grand jury indictment signaled the beginning of further trouble, Theodora decided that the time had come to leave her hometown. On September 22, 1894, Theodora sold the Blue Light and transferred the forty-four promissory notes used in its purchase to Emma L. Kring.⁶³ One last record of 1895 refers to Theodora Hemphill residing at 307 West Second Street, near the intersection of Lavaca.⁶⁴ Then she disappears from the historical record.⁶⁵

Five decades later, an Austinite recalled seeing Theodora Hemphill in New Orleans. I have not been able to track down her further whereabouts.⁶⁶ If Theodora moved to the Crescent City in search of racial equality not found in Texas, she searched in vain.

On May 18, 1896, two years after she sold the Blue Light, the United States Supreme Court decided *Plessy v. Ferguson*,⁶⁷ the landmark “separate but equal” opinion upholding the constitutionality of racial segregation. *Plessey* arose in New Orleans when a man of mixed race, plaintiff Homer Adolph Plessy,⁶⁸ purchased a ticket to sit in a “white’s only” railway car of the East Louisiana Railway Company in New Orleans, and then refused a private detective’s order to leave. After Plessey was arrested in the Press Street Railway Yard for violating Louisiana’s 1890 Separate Car Act,⁶⁹ the New Orleans Comité des Citoyens (Committee of Citizens) filed suit on Plessey’s behalf in a Louisiana state court under the Fourteenth Amendment, which guaranteed all citizens equal protection under the law.

In a seven-to-one decision, U.S. Supreme Court Justice Henry B. Brown rejected Plessy’s challenge to Louisiana’s statutory racial segregation governing public facilities:

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State....The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court.⁷⁰

⁶¹ No. 10415, Minutes of the Travis County Criminal District Court, Vol. D, 607.

⁶² *Ibid.*

⁶³ Travis County Deed Records, Vol. 126, 371.

⁶⁴ Morrison & Fourmy, *Morrison & Fourmy’s General Directory of the City of Austin, 1895–1896* (1895), 164, in [Ancestry.com](https://www.ancestry.com).

⁶⁵ This author has searched, without success, for Theodora Hemphill after 1895 in Ancestry.com’s lists of vital records; the New England Historical and Genealogical Service databases; record searches in the Houston Public Library’s records at the Clayton Genealogical Library, including the Mary Fay Collection of Hemphill Family records; the John Hemphill (and Hemphill Family) Vertical File Folder at the Austin History Center; the Find-A-Grave database; and many online Google, Google Scholar, and Google Books searches.

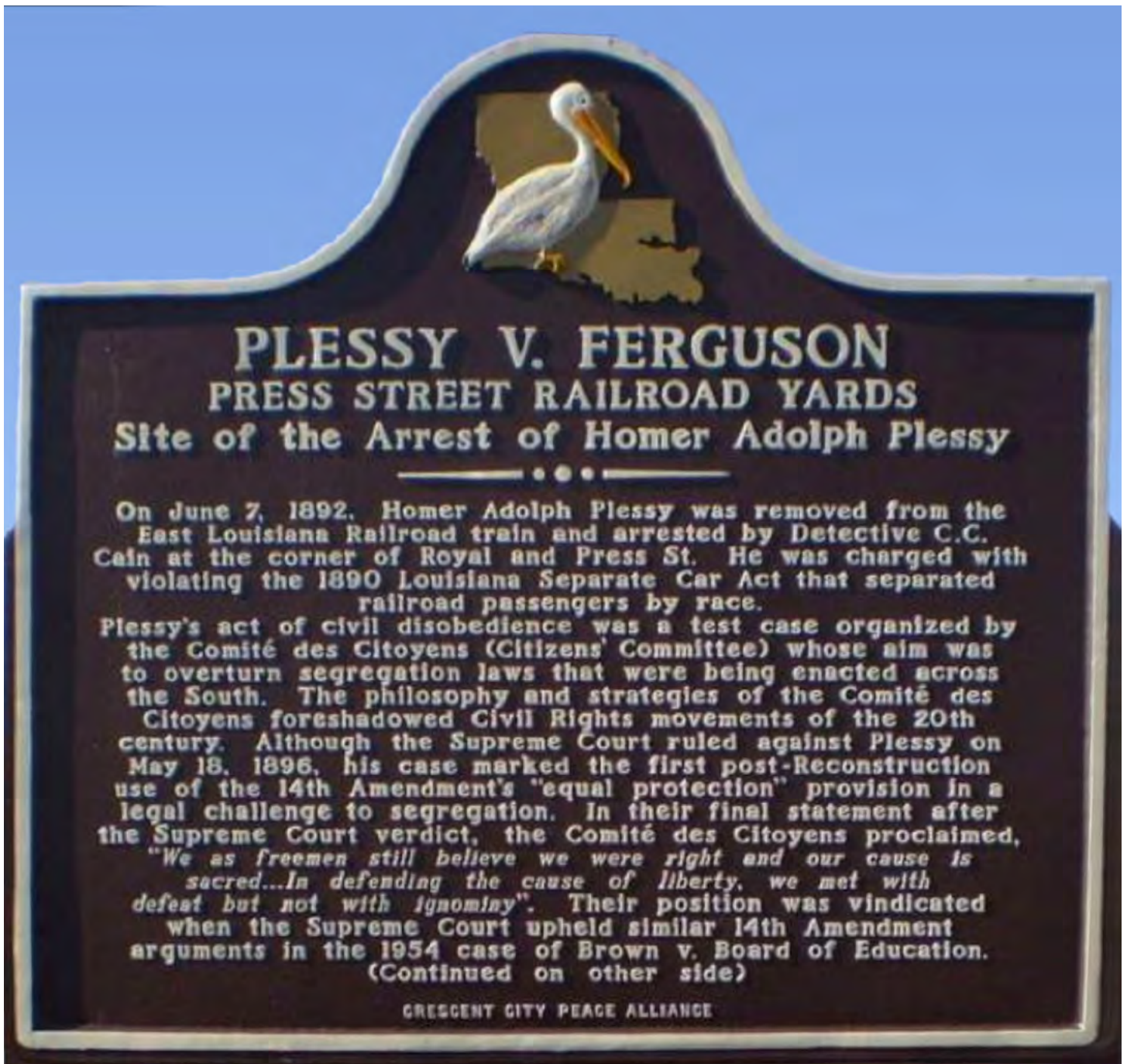
⁶⁶ Statement of J. E. Grizzard (March 31, 1939), 1.

⁶⁷ *Ex Parte Plessy*, 11 So. 948 (La. 1892), *affirmed*, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶⁸ Plessy was an “octaroon” in Louisiana parlance, seven-eighths European, and one-eighth African American, but Louisiana law deemed him to be black.

⁶⁹ La. Gen. Assembly, Acts 1890, No. 111, 152.

⁷⁰ *Plessy*, 163 U.S. at 545.



The *Plessy v. Ferguson* marker in New Orleans written by historian Keith Weldon Medley for placement by the Crescent City Peace Alliance at the corner of Press Street and the East Louisiana Railroad Yards on February 12, 2009.

* * * * *

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it....⁷¹

⁷¹ *Plessy*, 163 U.S. at 551.

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.... If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.⁷²

In *Plessy*, the U.S. Supreme Court placed its official seal of approval not only on Louisiana's Separate Car Act, but also on the "Redeemer" Texas Supreme Court's *Clements v. Crawford*⁷³ repudiation of *Honey v. Clark*,⁷⁴ Texas's 1876 Constitution, Jim Crow segregation, and state miscegenation statutes. In the decade after *Plessy*, the Texas Legislature and other Southern legislatures disenfranchised African-Americans, poor whites, and Hispanics by enacting statutory literacy tests, land-ownership voting requirements, poll taxes, and whites-only primaries.

But one member of the *Plessy* Court, Justice John Marshall Harlan, filed a scathing dissent in which he observed that,

[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.⁷⁵

Justice Harlan's Dissent echoed what Theodora had learned about the equality of all citizens as a young girl attending Wilberforce University in Xenia, Ohio.⁷⁶

A decade after Theodora left Austin, the Reverend Bob Shuler waged a holy war from the pulpit against Guy Town and Austin's toleration of prostitution, invoking the threat of incurable syphilis, the danger of alcohol, and the need to protect the morality of the University of Texas's student body. In 1913, Austin Mayor Alexander P. Woolridge convinced the City Council to shut down Guy Town and to evict its prostitutes effective October 1 of that year.⁷⁷ When a phalanx

⁷² *Ibid.*, 163 U.S. at 552.

⁷³ 42 Tex. 601 (1875).

⁷⁴ 37 Tex. 686 (1873).

⁷⁵ *Plessy*, 163 U.S. at 559 (Dissent).

⁷⁶ Theodora and Henrietta Hemphill both appear with an "Austin, Texas" home address in *The Catalogue of the Wilberforce University 1859-1860, Xenia, Ohio* (Cincinnati: R. P. Thompson, 1860), 9; American Antiquarian Society, Ancestry.com "U.S., School Catalogues, 1765-1935" ("Ladies"). The Reverend John F. Wright's resolutions, as they appear in the *Catalogue*, states that, "We give no countenance to any theory which goes to deprive any black man of his full share in our common humanity, but hail him as a man, a brother, in accordance with that grand affirmation of the Bible, which must forever settle the unity of the human race..." *Ibid.*, 23. Cf. *The Triennial Catalogue of the Wilberforce University for the Academical Year 1870-1871, Near Xenia, Green County, Ohio* (Xenia, OH: Xenia Gazette Co., 1871), 11, Ancestry.com.

⁷⁷ Quigley, "Disreputable History of Guy Town," *Austin Chronicle*.

of Austin police officers entered Guy Town to enforce the ordinance, the prostitutes left and a colorful era concluded with a whimper. Guy Town, where Theodora Hemphill spent her last years in Austin, is now part of a sleek entertainment district that includes Austin City Limits, fine restaurants, and many bars. Signboards celebrate the life of Willie Nelson, but none mention Chief Justice Hemphill, Washington Hemphill, Sabina, or the Chief Justice's daughters Theodora and Henrietta Hemphill.



Theodora Hemphill's *Blue Light* was near the current statue of Willie Nelson (2012) at the corner of Willie Nelson Blvd. (formerly Second Street) and Lavaca, outside the studio of *Austin City Limits*.

After leaving Austin for New Orleans, Theodora Hemphill disappeared from the historical record. The Redeemer Court's *Clements v. Crawford* repudiation of the Reconstruction Court's *Honey v. Clark* ruling, discrimination against mixed-race children and heirs of plantation masters, and Southern restrictions on education and interracial marriage remained a part of Theodora's life until she died on a date and in a place unmarked by any known grave.

During the second half of the twentieth century, Justice Harlan's *Plessy* dissent inspired a new generation of U.S. Supreme Court Justices to end the era of racial segregation. Fifty-six years after Theodora Hemphill left Austin, in *Sweatt v. Painter*, a unanimous U.S. Supreme Court held that the 1876 Texas Constitution's racial segregation provisions barring blacks from attending the University of Texas Law School created a system of professional education that

was separate but constitutionally unequal.⁷⁸ Four years later, in *Brown v. Board of Education of Topeka, Kansas*, a unanimous Court held that laws creating racially segregated public school systems violated the Fourteenth Amendment.⁷⁹ A decade later, Congress enacted the Civil Rights Act of 1964 to end unequal application of voter registration requirements, abolish school segregation, and end racial discrimination in the workplace and in restaurants, hotels, and other public accommodations that serve the general public.⁸⁰ Another resident of Theodora Hemphill's Texas Hill Country, President Lyndon B. Johnson, signed that bill into law.

The era of racial inequality under the law did not end until June 12, 1967, when the U.S. Supreme Court struck down Virginia's miscegenation statute, the Racial Integrity Act of 1924, in *Loving v. Virginia*.⁸¹ Chief Justice Earl Warren, writing for a unanimous Court, held that the freedom to marry was one of the "basic civil rights of man," and that states had no business interfering with that decision:

⁷⁸ 339 U.S. 629 (1950).

⁷⁹ 347 U.S. 483, 486 (1954).

⁸⁰ Pub.L. 88-352, 78 Stat. 241, enacted July 2, 1964.

⁸¹ 388 U.S. 1 (1967).

Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State. There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy....There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.⁸²

One of sixteen miscegenation laws *Loving* invalidated (all of them in Southern states) was Texas Penal Code Article 492, a 1952 statute that made interracial marriages illegal in Texas.

The Hemphill saga remains largely unknown. Jewette Harbert Davenport's *History of the Supreme Court of the State of Texas*, published in 1917, praised Hemphill's judicial leadership but mentioned nothing about Sabina or his daughters.⁸³ Davenport praised slaveholding judges but lambasted Reconstruction-era Justices for imposing "radical military rule under an infamous carpet-bag regime," that is, for protecting the Thirteenth, Fourteenth, and Fifteenth Amendment rights of recently freed slaves.⁸⁴

The Hemphill family biographer, Rosalee Morris Curtis, portrayed the Chief Justice as a Southern bachelor who "was never married but his domestic economy was looked after by a faithful slave named Sabina."⁸⁵ "[H]e was particularly interested in the rights of women and championed the preservation of their rights under the original civil law of Texas, as distinguished from the common law."⁸⁶ Rosalee acknowledged that Hemphill and his domestic servant, Sabina, had created a family, but relegated that story to footnotes: "Those wishing to pursue the subject further [of Anson Jones' statements about Hemphill's African-American family] may refer to Cause No. 3074 in the District Court of Travis County, Texas, entitled *Theodora Hemphill v. James Hemphill et al.*, and Cause No. 2594, District Court, Travis County, Texas, entitled *R.S. Rust v. F. W. Chandler, Administrator.*"⁸⁷

Throughout his life, Hemphill defended the slavery that surrounded him in South Carolina and Texas. As Chief Justice, his ideas and rulings raced far ahead of his time when he addressed the rights of women, the needs of debtors, and the value of the Castilian legal tradition to Texas jurisprudence. But, aside from deciding that his own daughters should not remain enslaved, his vision failed when he should have seen how the evils of slavery fell hard on the woman and daughters he loved.

Instead of recognizing that basic justice required him to seek to end slavery, Hemphill sought

⁸² 388 U.S. at 12.

⁸³ J.H. Davenport, *The History of the Supreme Court of the State of Texas: With Biographies of the Chief and Associate Justices* (Austin: Southern Law Book Pubs., 1917), 16.

⁸⁴ *Ibid.*, 97.

⁸⁵ Curtiss, *John Hemphill*, 40, 84.

⁸⁶ *Ibid.*, 68.

⁸⁷ *Ibid.*, 77. n.11 and 109, n.11.

to preserve, protect, and perpetuate it by leading Texas into a war of Southern independence. Yet, as a Calvinist Presbyterian of Scots-Irish ancestry, he understood the hard lessons taught by Numbers 14:18 in his King James Bible, "The LORD *is* longsuffering, and of great mercy, forgiving iniquity and transgression, and by no means clearing *the guilty*, visiting the iniquity of the fathers upon the children unto the third and fourth *generation*."

The 1845 Constitution John Hemphill helped draft, and the institution of slavery he consistently defended, blighted the lives of Hemphill's de facto wife and their daughters. That constitution and the 1861 Confederate Texas Constitution denied John Hemphill that third and fourth generation of descendants every proud Southern patriarch desired. Slavery was tragic not only for the slave, but also for the master, even a chief justice and senator.



DAVID A. FURLOW *is an attorney, historian, journalist, and archaeologist. Any reader willing to share additional information about John, Sabina, Theodora, Henrietta, and James Hemphill should contact David at dafurlow@gmail.com.*

[Return to Journal Index](#)

Book Review: *Edmund J. Davis: Civil War General, Republican Leader, Reconstruction Governor*

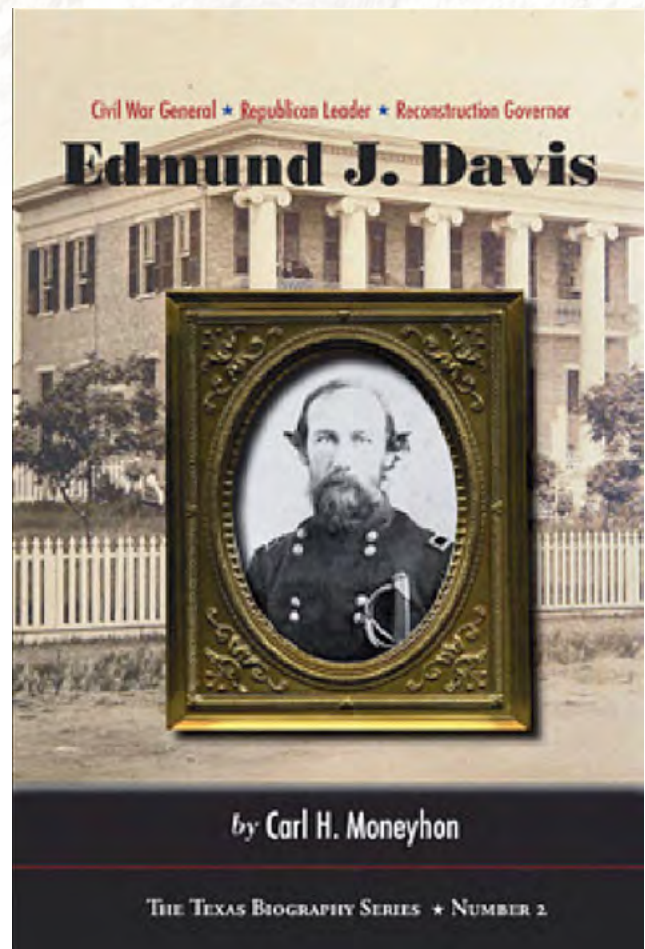
By Patrick Judd

The old question, “Where do I go to get my reputation back?” finally has a simple answer—to a good historian!! Carl H. Moneyhon, professor of history at the University of Arkansas in Little Rock, has written *Edmund J. Davis: Civil War General, Republican Leader, Reconstruction Governor*—a near definitive account of one of the most maligned and reviled political personalities in Texas history.

Over the decades, Governor Edmund J. Davis’s reputation was cemented into place by historians and newspaper editors who depicted him as the personification of every criminal abuse that transpired in the turbulent Reconstruction era in Texas. Moneyhon’s carefully written book is a strong corrective to this false understanding of E. J. Davis’s administration. Moneyhon’s biography of the Reconstruction-era governor is concisely written and deeply researched and is an outstanding political history.

Davis emerges as a progressive politician of courage and conviction who tirelessly pursued modern goals for a state hindered by lawlessness, near bankruptcy, and a stultifying ideology built on white supremacy. Moneyhon’s study breaks Davis’s career into three periods: his service as a Union general during the Civil War, his governorship, and his career as the foremost progressive Republican leader in deeply secessionist Democratic Texas. In examining Davis, Moneyhon reveals a man driven by a persistent determination to guarantee all Texas citizens equal rights, equal education, and protection of voting rights. Davis was an activist both in and out of office who spent thirty years of his life trying to create a more modern Texas.

According to Moneyhon, Davis was “brought face-to-face with a personal crisis” at the outset of the Civil War. Davis was a strong Unionist and felt threatened by Confederate



Edmund J. Davis: Civil War General, Republican Leader, Reconstruction Governor
by Carl H. Moneyhon
Texas Biography Series
Fort Worth: TCU Press, 2010

conscription and the loyalty oath being required of all Texas state officeholders, so he fled the state, leaving behind his wife and two young sons. According to Moneyhon, he was animated by “considerable anger, perhaps even hatred.”

As a Union brigadier general, Davis was determined to destroy the Confederacy in Texas. Moneyhon concludes that the war years had a profound effect on Davis. He had been persecuted, nearly lost his family, almost been hanged, and experienced the grisly fighting that defined the war. At war’s end, Davis returned to Texas and continued his legal practice in Corpus Christi. According to Moneyhon, “he unquestionably returned holding harsh feelings towards former Confederates.”

Texas, like all the former Confederate states, would undergo Reconstruction at the end of the war. Davis, a prime mover behind the creation of the new Radical Republican Party, now saw a supreme opportunity to take over the state government. He worked to organize black voters, opened a party newspaper—*The Union Republican*—in Corpus Christi, and sought to reconcile the two wings of the Texas Republican Party. In early 1870, by the narrowest of margins, E. J. Davis took office as Texas’s first Republican chief executive.

Governor Davis faced a profound crisis of public order. He resolved to make law and order the number one priority, which would require a centralization of state power. Davis believed that much of the unparalleled violence engulfing Texas had strong political overtones: freedmen and white Unionists were targeted repeatedly. Republican majorities in both houses gave him the necessary tools to fight back: a State Police force, a frontier defense force, a new State Guard, a new militia, and the power to declare martial law. Davis’s Republicans also established the first real state school system in Texas. Davis would resort to martial law three times in 1871. Democrats poured invectives upon him for “abusing power,” and his use of martial law no doubt contributed to his 1873 reelection trouncing by secessionist Democrat Richard Coke. Davis spent his last year in office fighting a rear guard action to keep his legislative programs from being dismantled, all to no avail. Each of his vetoes was overridden.

Historian Moneyhon reveals Davis out of office as a tireless party leader intent on keeping his party viable and working to resurrect the progressive goals of open elections, law and order, statewide education, and full rights for African Americans. Generally ignored by the national party, Davis’s labors to preserve the newly built Texas Republican Party foundered.

As political history this book is first rate. No one will come away from it without having to rethink Texas’s history during the tumultuous post-Civil War period.



PATRICK JUDD graduated from the University of Texas at Austin (M.A., 1983) and taught American history for twenty-nine years in the Austin Community College History Department.

[Return to Journal Index](#)

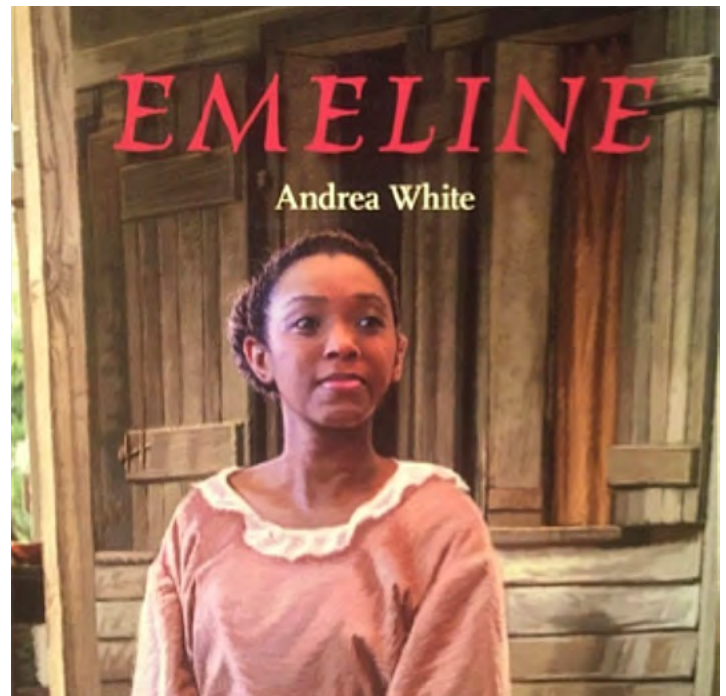
Andrea White's Book *Emeline* Tells a Wonderful Story

By Laura Gibson

In an 1848 trial, a young man destined to later serve on the Texas Supreme Court, Peter Gray, convinced a Houston jury that an enslaved mother of two boys, Emeline, a “free woman of color,” was entitled to her freedom. Emeline had been wrongfully re-enslaved after becoming a free woman, Mr. Gray argued. As Judge Mark Davidson observed, “Emeline was a courageous woman who risked torture and loss of her children so that she could be free. She trusted that our courts would provide justice. She was right.” Although some of the jurors were slaveholders, Peter Gray’s skill and Emeline’s courage convinced the jury to recognize Emeline’s and her sons’ right to live free.

Houston author Andrea White’s book *Emeline* (South Hampton: Namelos Press, 2015) tells the wonderful story of attorney and Texas Supreme Court Justice Peter Gray’s successful pro bono representation of Emeline, the free woman of color Gray freed from slavery’s bonds.

Andrea White, an attorney, *Houston Chronicle* editor, literacy activist, and author of several Young Adult fiction books, as well as former Houston Mayor Bill White’s wife, based this work of



Left: Andrea White, “Gray Matters” contributor, *Houston Chronicle*.
Right: *Emeline*’s book cover, illustration by Dan Burr, provided by Andrea White.



Emeline illustrations by Dan Burr, provided by Andrea White.
Left: Emeline and her son John. Right: Emeline and Peter Gray.

historical fiction on retired Harris County District Court Judge Mark Davidson's reconstruction of a courthouse drama that had remained undiscovered for more than one hundred and fifty years in Harris County's courthouse records. Ms. White's book tells a tale about the impact one man's belief in the rule of law can have on ordinary people.

Ms. White's elementary school characters bring this important story to life for modern readers. She begins the story by looking at Emeline through the eyes of Peter Gray's blonde-haired, blue-eyed daughter and her best friend, Laura Beth Bolls, the daughter of Emeline's owner, Jesse P. Bolls. Artist Dan Burr has beautifully illustrated this book. His images reflect the care and concern Emeline showed for her son, John, as well as the menace of Jesse Bolls, who strides through the pages, whip in hand. They demonstrate how important it was to her that she secure her freedom so that she would not be separated from the young son her owner intended to sell. The book also shows the importance of following the rule of law even when doing so runs contrary to popular opinion.

During the 2015-16 Houston Bar Association year, the HBA partnered with the Houston Grand Opera and Communities in Schools to tell the Peter Gray story through a specially commissioned opera. The opera was performed at three service-raisers (events intended to inspire voluntary service) for the Houston Volunteer Lawyers in nine of our public schools.

After Baker Botts sponsored the Houston Grand Opera's production of this new opera about Peter Gray's vindication of Emeline's freedom, "What Wings They Were," HGO asked

Andrea to write a book about the story for students. Baker Botts purchased one hundred of the resulting books, and the Houston Area Women’s Center paid for another one hundred. Andrea and her husband, Mayor Bill White, purchased the remaining eight hundred books. Andrea and Bill White have donated many of those books to HGO, which has then distributed them in schools hearing its opera. Andrea has also shared the books with participants in 2016 CLE programs.

As Baker Botts attorney and historian Bill Kroger observed, “Andrea White’s book reminds us of many important truths about justice and freedom. These rights exist for us today only because people like Emeline and Peter Gray have been willing to stand up and fight for them.” Through Andrea’s book and the opera, the Houston Bar Association’s lawyers reminded Houston’s citizens of the vital role law can play in protecting every person’s rights.



LAURA GIBSON, *a partner with the multinational law firm Dentons LLP, is the Immediate Past President of the Houston Bar Association.*

[Return to Journal Index](#)

Texas's Constitutional History Begins Not in 1836 But in 1824

A review of Manuel González Oropeza's and Jesús Francisco de la Teja's
Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827
(*Acts of the Constituent Congress of Coahuila and Texas, 1824-1827*)
(Mexico City: Tribunal Electoral del Poder Judicial de la Federación, 2016)

By David A. Furlow

As T. R. Fehrenbach saw it, Texas constitutionalism began at Washington-on-the-Brazos on March 2, 1836. The delegates to the 1836 Convention there drafted a constitution based on “a model they knew and loved,” the U.S. Constitution. Certain “men of good education and vast experience”—Robert Potter, Samuel Carson, Richard Ellis, Martin Parmer, Thomas Rusk, James Collinsworth, and George Childress—joined with “Lorenzo de Zavala, the eminent Republican,” and Sam Houston, “the most important man at the convention,” to create “a composite of the constitutions of both the [American] Union and several Southern states.”¹ Fehrenbach noted how de Zavala “tried to begin a speech by saying ‘*Mr. President, an eminent Roman statesman once said—*’ only to be cut short by Tom Rusk...[who] snapped that the problem was not dead Romans but live Mexicans.”²

Long before Tom Rusk rudely interrupted his fellow delegate, he knew that his fellow delegate Lorenzo de Zavala was a “live Mexican” as well as a lively Texas constitutionalist, too. Born near Mérida in Mexico’s Yucatan, he began advocating for the rule of law in liberal newspapers in his youth, then helped draft an imperial constitution as a delegate to the Spanish Cortes of 1821, represented Yucatan as a deputy in the First and Second Mexican Constituent Congresses of 1822 and 1824, quilled his name to the Mexican federal Constitution of 1824, served as governor of the State of Mexico and as Mexico’s Secretary of the Treasury in 1829, and in 1835 called on Texans and Tejanos to oppose General López de Santa Anna’s assumption of dictatorial powers.

Dr. Manuel Gonzalez Oropeza and Dr. Jesús Francisco “Frank” de la Teja,³ have jointly compiled and coordinated publication of a scholarly, two-volume treatise that analyzes and places into historical context the pre-1836 constitutionalism that Lorenzo de Zavala exemplified

¹ T. R. Fehrenbach, *A History of Texas and the Texans* (New York: American Legacy Press, 1968, rev. 1983, 2000), 222.

² *Ibid.* See also Journals of the Convention of the Free, Sovereign, and Independent People of Texas, in General Convention Assembled (March 1, 1836), reprinted in 1 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-97*, 1063 (Austin, Gammel Book Co. 1898).

³ Manuel Gonzalez Oropeza, Ph.D., is a respected Mexican academic and Judge of the Superior Court of the Federal Election Tribunal (2006-2016). Jesús Francisco “Frank” de la Teja is the Jerome H. and Catherine E. Supple Professor of Southwestern Studies, Regents’ Professor of History, and Director of the Center for the Study of the Southwest at Texas State University in San Marcos.

and T. R. Fehrenbach overlooked or ignored. The Tribunal Electoral del Poder Judicial de la Federación in Mexico City published Dr. Oropeza's and Dr. de la Teja's work *Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827, Primera Constitución bilingüe: Proceedings of the Constituent Congress of Coahuila and Texas, 1824-1827, Mexico's Only Bilingual Constitution*.⁴

The publication of the *Actas* now provides historians, attorneys, jurists, and the public with primary records, secondary authorities, and in-depth analysis of the Constituent Convention. It also contains

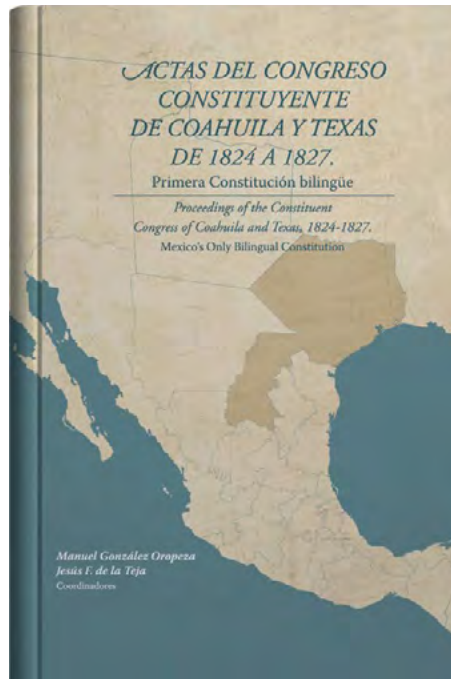
photographic images of key documents debated or promulgated during the Convention. This two-volume set thus contains everything necessary to bring a rarely examined chapter in Mexico's, Texas's, Coahuila's, Tamaulipas's, and Nuevo León's complex, interconnected constitutional history to life.

First and foremost, the *Actas* is a paleographic transcription and facsimile of the original records of Texas's first state constitutional convention, a convention shared with its more populous neighbor, the Mexican state of Coahuila. These records, many of them made available for the first time in English, enable lawyers, judges, and social scientists to fill many gaps in the record of a historically significant event during a uniquely important time for stories of the Southwest.

In addition, the *Actas* provide a needed corrective to traditional narrators, like Fehrenbach, who wrote that Mexico's citizens were ignorant, debased, and incapable of self-government. According to Fehrenbach, the differences between Mexicans and Tejanos, on one hand, and Anglo-American Texans, on the other, existed deep in their contending cultures, dooming the two competing groups to conflict:

The Mexicans, unlike North Americans, had been able neither to form a free government, nor a viable government. Anglo-Americans took pride primarily in the fact that they were free men, and their contempt for any men who could not achieve a similar system of government was both genuine and unavoidable. Americans did not understand cultural pride....

La raza, as Mexicans were beginning to call themselves, did not mean "race" in the sense of the English word. It was a cultural thing...[and] referred not to blood



The cover of the *Actas* and the helpful CD annex included with Volume I.



⁴ (Mexico City: Tribunal Electoral del Poder Judicial de la Federación, 2016) (*hereinafter*, *Actas*).

... y el Honorable Congreso tendrá la complacencia de no haber gravado á los Pueblos con contribuciones.

La tranquilidad publica que actualmente se disfruta es estensiva atodo el territorio del Estado. Los comanches y otras tribus de indios que habitan las fronteras del norte rompieron sus hostilidades en Julio de 1825. que han cesado hace pocos meses el Gobierno espera que el Ciudadano Comandante General de estos Estados ponga en movimiento las fuerzas militares que están á sus ordenes para obligar á estas tribus a hacer una paz duradera, la revolucion que proyectaron en el ultimo Diciembre algunos estranjeros en Nacogdoches unidos á algunas parcialidades de indios tambien estranjeros, para apropiarse una considerable porcion del Estado y de los limitrofes, fue cortada enteramente en sus principios á consecuencia del movimiento tan oportuno que hizo sobre

“The public tranquility that is at present enjoys extends throughout the state’s territory. The hostilities with the Comanches and other Indian tribes who inhabit the northern frontier that broke out in July 1825 have ceased a few months since, and the Executive hopes that the citizen commandant general of these states will put in motion the military forces at his orders to force these tribes to make a lasting peace. The revolution attempted last December by a few foreigners in Nacogdoches together with some groups of Indians (also foreign), in an attempt to appropriate for themselves a considerable portion of this state and the neighboring ones, was completely cut off at its roots as a result of the timely movement against them by the principal commander of Texas and the political chief of that department with the military force residing at Béxar and the national militia of Austin’s colony.

The treatise contains parallel constitutional convention records in Spanish and English.

in the veins but to an entire cultural heritage that extended back to Rome....And it pointed up a separation that had existed since the days when Nordics crashed against the Latin Roman Empire. If Nordics saw Latins as somewhat degenerate, tyrannical, slavish, and cruel, Latins considered the Northerners arrant barbarians.⁵

According to Fehrenbach, Mexicans were subjects incapable of self-government, not citizens striving to participate in a pluralistic society:

The Mexican Republic resembled that of the United States only slightly, although the Constitution of 1824 created a federal system of sovereign States. Mexico had no tradition of strong, local governments; the Spanish tradition was strongly centralist in both theory and practice, and the Hispanic love of regulating equaled or surpassed the Anglo-Saxon tendency to legislate....

In Mexico there was no citizenry in the North American or European sense. There were only subjects of different degrees. And there was no tradition, such as had originated in the British world, that governmental powers originated in and with the people.⁶

⁵ Fehrenbach, *A History of Texas*, 162.

⁶ *Ibid.*, 155.

It may come as little surprise that Fehrenbach did not even acknowledge the existence of the 1824–1827 Constituent Congress of Coahuila and Texas.

When Fehrenbach wrote that the “English language was first recognized for official business” in 1834,⁷ he failed to analyze or disregarded the inconvenient fact that the representatives of the Constituent Congress of Coahuila and Texas adopted a bilingual constitution—in Spanish and in English—on March 11, 1827, which included a preamble, preliminary provisions, seven titles, and 225 articles.⁸ The State of Coahuila and Texas was bilingual from birth: “Its bilingual population demanded from the outset that it be issued in Spanish and in English. The linguistic rights of the residents were always guaranteed and the proof is the Constitution presented in this work.”⁹ A facsimile copy of the English language version of the combined state constitution printed by the Telegraph Power Press of Houston, Texas in 1839 appears in the first volume of the *Actas*.¹⁰

The lawyers and legislators who emerge in these records of Coahuila and Texas engaged in a well-organized, long-standing effort to create a liberal system governed by the rule of law. Inspired by Miguel Ramos Arizpe, lawgivers in the General Command of the Internal Eastern Provinces during the last years of the Spanish viceroyalty—Spanish Texas, the New Kingdom of León (current Nuevo León), New Santander (current Tamaulipas), and Coahuila—dreamed of drafting charters like the U.S. Constitution and the French revolutionary declaration of the rights of man that transformed subjects into citizens possessed of inalienable rights under governments of circumscribed power.

Article 11 of the Coahuila y Texas Constitution, for example, stated that, “[e]very man who resides within the limits of the state, although but transiently, shall enjoy the imprescriptible rights of liberty, security, property, and equality; and it is the duty of said state to preserve and protect by wise and equitable laws, these universal rights of man.” Article 12 guaranteed those individual liberties Fehrenbach celebrated as the highest achievement of the “Anglo-Celtic” pioneers who stamped their culture on Mexican Texas, the Republic, and antebellum Texas:

The state is also obligated to protect all its inhabitants in the exercise of the right they possess of writing, printing, and freely publishing their sentiments and political opinions, without the necessity of any examination, or critical review previous to their publication, under the responsibility and protections that are now, or shall be hereafter established by the general laws on the subject.

This constitutional language reflects a striving for rights falling somewhere between those granted in French declarations of universal rights and American restrictions on the power of their federal government’s power such as the Bill of Rights.

⁷ *Ibid.*, 184.

⁸ Constancio Carrasco Daza, “Presentation,” *Actas*, vol. I, 23; Special open session of March 11, 1827. Mr. Valle presiding, *Actas*, vol. II, 1520–21.

⁹ Manuel González Oropeza, “The First Constitution of Mexico’s Largest State,” *Actas*, vol. I, 49.

¹⁰ Laws and Decrees of the State of Coahuila and Texas, in Spanish and English, to which is added the Constitution of Said State, *Actas*, vol. I, 225–57.

Article 13 of that 1827 Constitution of Coahuila y Texas made it clear that Article 11's protections applied to "every" man in a constitution that proclaimed the "universal rights of man," entitled to their state government's protection of "all its inhabitants" political rights in Article 12—expressly including African and African-American slaves. Article 13 stated that, "[f]rom and after the promulgation of the constitution in the capital of each district, no one shall be born a slave in the state, and after six months the introduction of slaves under any pretext shall not be permitted." In the universality of its inalienable rights, the 1827 Constitution of Coahuila y Texas proved far more amenable to the freedom and equality of all its citizens than the inherently racist, slavery-sponsoring Texas constitutions of 1836, 1845, and 1861. The records of the Constituent Congress show not only two very different ways of recognizing and protecting freedom and equality while casting a harsh but clear light on the choices available to the men who drafted the 1836, 1845, and 1861 constitutions, who subordinated universal freedom to the State's power to protect an economic system of slavery.

This two-volume treatise goes a long way to refute Fehrenbach's assumption that Mexico's citizens were servile subjects who deserved only to be dictated to by the likes of Santa Anna. Those members of the Society who heard Dr. de la Teja speak at the Fall 2015 Board of Trustees' Meeting will especially value the article that memorializes that speech, "Texas in Mexico's Constitutional Order (1821–1836)."¹¹ Other seasoned scholars whose Southwestern-focused analysis appears here include the introductory presentations of Constancio Carrasco Daza, José Alejandro Luna Ramos, and Eliseo Mendoza Berrueto,¹² Manuel González Oropeza's "First Constitution in Mexico's Largest State,"¹³ and a special joint paper coauthored by Dr. Oropeza and Pedro Alfonso López Saucedo, "Coahuila and Texas: A Shared History of the Mexican Federation."¹⁴

Finally, the *Actas* emphasize the importance of contingency in history. Are individual lives merely leaves swept along in the river of time? How important is the life of any individual in shaping history? Let's engage in a counter-factual exploration, for a moment, to ask how differently these records of Coahuila y Texas's Constituent Congress might appear if Antonio López de Santa Anna's claim to fame (or infamy) rested not on his suppression of rebels in the Yucatan and Zacatecas, the siege of the Alamo, the massacre at Goliad, the defeat at San Jacinto, the disastrous defeats at Buena Vista and Cerro Gordo during the Mexican War, or the sale of the Mesilla Valley to the U.S. as the Gadsden Purchase.

Imagine, instead, that Santa Anna was a hero venerated in the hearts and history of Mexicans because he died defeating the Spanish invasion of Tampico in 1829. If the liberal Santa Anna of 1829 had never become the Centralista caudillo of 1835, and if no other Centralista had played a similar dictatorial role, the history of the Constituent Congress might be remembered as an aspect of an ultimately successful struggle to create constitutional government in northern Mexico and its states of Coahuila and Texas. Stephen F. Austin and others inclined to make compromises with like-minded Mexican liberals might have found ways to avoid the troubles of

¹¹ *Ibid.*, vol. I, 19–38 (respectively).

¹² *Ibid.*, vol. I, 39–50.

¹³ *Ibid.*, vol. I, 39–50.

¹⁴ *Ibid.*, vol. I, 63–188.

1832 and the revolution of 1835–1836. Texas, then, as well as Coahuila, Nuevo Mexico, Arizona, and California might have become independent, Anglo-influenced states in a Mexican union rather than Spanish heritage states in the United States of America.

The hinge of history might have swung southward rather than toward the north if Santa Anna, a man on horseback who held constitutional rights in contempt, had not risen to ultimate power while swearing to rid Mexico of the Anglo-American immigrants, legal and illegal alike, whom he and many contemporaries viewed as an intolerable threat to his homeland's traditional way of life. This scholarly treatise brings new depth and detail to the history of constitutionalism in Texas while challenging errors and stereotypes long in need of correction.

[Return to Journal Index](#)

In Memoriam

Karen R. Johnson, 1944-2016

Austin attorney and civic leader Karen R. Johnson, who served as President of the Texas Supreme Court Historical Society's Board of Trustees from 1999 to 2001, died at her home in Austin on June 5.

Born on April 6, 1944 in Fort Worth, Texas, Karen was the only child of Robert and Wilda Ruble. She graduated from the University of Texas at Austin in 1966, and received her J.D. from St. Mary's School of Law in 1970. She married fellow St. Mary's Law graduate James M. Johnson in August of 1970. After graduation, she served as a briefing attorney for Texas Supreme Court Justice Zollie C. Steakley.

Ms. Johnson's distinguished career in law and public service included a number of firsts. She was elected the first woman President of the Travis County Bar Association in 1985 and was then elected to the State Bar Board of Directors and served on the Executive Committee. She then became the first woman to serve as Executive Director of the State Bar of Texas, a position she held from 1990 to 1994.

Ms. Johnson left her administrative role at the State Bar in 1994 to join Entergy Corporation/Gulf States Utilities as Vice President of State Governmental Affairs, and she later served as President of that firm. From 2001 to 2013 she served as President and CEO of United Way of Austin.

In 2013, she created KRJ Resources LLC, a public policy consulting firm that focused on regulatory and policy issues concerning state agencies and the legislative and executive branches of Texas government. She was also CEO of the nonprofit Power Across Texas. In addition to these posts, Ms. Johnson was at the time of her death a member of the board of directors of Global Impact, a nonprofit that raises money to meet humanitarian needs around the world. She also served on the board of directors of the Texas State History Museum Foundation.

Ms. Johnson was the Texas Supreme Court Historical Society's third President, after Justice Jack Hightower and Chief Justice Joe R. Greenhill. During her two-year term, she led an effort to expand the Society's membership and budget, and she continued to focus on those areas as a board member.

For more information about Karen Johnson's career and contributions, see the State Bar Blog at <http://blog.texasbar.com/2016/06/articles/state-bar/remembering-karen-r-johnson-former-sbot-executive-director/>.

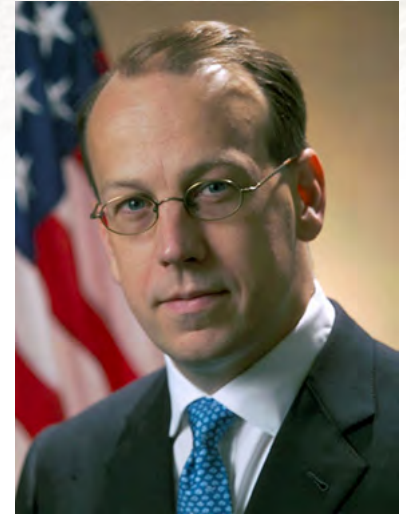


[Return to Journal Index](#)

Former U.S. Solicitor General Paul Clement Will Keynote Hemphill Dinner

The Honorable Paul D. Clement, former Solicitor General of the United States, will be the principal speaker at the Texas Supreme Court Historical Society's 21st Annual John Hemphill Dinner. The dinner, which is the Society's main fundraising event, is scheduled for Friday, September 9, 2016, at the Four Seasons Hotel in Austin.

When he served President George W. Bush as the 43rd Solicitor General of the United States from June 2005 until June 2008, Mr. Clement wielded enormous persuasive power as the third-highest ranking official in the Department of Justice. He represented the federal government before the United States Supreme Court.



Mr. Clement, now a partner at Bancroft PLLC in Washington, D.C., previously served as Acting Solicitor General for nearly a year and as Principal Deputy Solicitor General for more than three years.

A native of Cedarburg, Wisconsin, Mr. Clement received his bachelor's degree summa cum laude from the Georgetown University School of Foreign Service, and a master's degree in economics from Cambridge University. He graduated magna cum laude from Harvard Law School, where he was the Supreme Court editor of the *Harvard Law Review*.

Following graduation, Mr. Clement clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and for Associate Justice Antonin Scalia of the U.S. Supreme Court. After his clerkships, Mr. Clement went on to serve as Chief Counsel of the U.S. Senate Subcommittee on the Constitution, Federalism, and Property Rights.

2015-16 TSCHS President Ben Mesches will preside over the evening program at the Hemphill Dinner, which will include the presentation of the President's Award for outstanding contributions to the Texas Supreme Court Historical Society. The Texas Center for Legal Ethics will also present its Eighth Annual Chief Justice Jack Pope Professionalism Award, which recognizes a Texas appellate lawyer or judge who demonstrates the highest level of professionalism and integrity.

Proceeds from the Hemphill Dinner support the Texas Supreme Court Historical Society's ongoing efforts to collect and preserve the historic papers, photographs, and artifacts of the Supreme Court of Texas. The funds also support the Society's legal history book series and other

projects aimed at honoring the Court's history and educating the public about the state's court system.

On Saturday morning, September 10, current and former justices, briefing attorneys, and staff attorneys for the Supreme Court will gather for their annual reunion breakfast at the Texas Law Center in Austin.

A Hemphill Dinner fact sheet and ticket purchase form are available on the Society's website at <http://texascourthistory.org/hemphill>. For more information about the BA Breakfast, see <http://www.texascourthistory.org/SCOTXbaBreakfast>.

[Return to Journal Index](#)

All-Woman Court Ruled the State Bar Annual Meeting

By David A. Furlow

The Texas Supreme Court Historical Society's reenactment of oral argument before the 1925 All-Woman Texas Supreme Court was the hit of the 2016 State Bar Annual Meeting in Fort Worth. Under the direction of Fellows Chair David Beck, Fellow Warren Harris, and *Journal* editors David Furlow and Lynne Liberato, the Society reenacted the Texas Supreme Court's famous "All-Woman Court" case: *Johnson v. Darr*, 114 Tex. 516, 272 S.W. 1098 (1925).

The reenactment took place Thursday morning, June 16, 2016 at the Fort Worth Convention Center. Fifth Circuit Judge Jennifer Elrod, Texas Supreme Court Justice Eva Guzman, and Texas Supreme Court Justice Debra Lehrmann portrayed the three justices. Former Justice (ret.) David Keltner and former Society President Doug Alexander portrayed the El Paso attorneys who argued the case. They used archival copies of *Johnson's* appellate record, original briefs, and contemporary correspondence provided by Texas Supreme Court Archivist Tiffany Shropshire Gilman and David Furlow to prepare for oral argument. The Society would also like to thank Blake Hawthorne, Clerk of the Court, for invaluable assistance in providing historical information on the case.

Before the program began, former Society President Lynne Liberato showed the reenactors Special Chief Justice Hortense Ward's silver suffragette cup and her original All-Woman Court gavel. Special Chief Justice Ward's descendant, civic activist Linda Hunsaker, lent the Society the original wooden gavel her ancestor used to call the All-Woman Court to order. Ms. Hunsaker also lent the Society her ancestor's silver loving cup commemorating Ward's success in leading Texas's women's suffrage movement, and the Cowgirl Hall of Fame's posthumous award of Cowgirl Hall of Fame status to Ward. Thanks in part to Hortense Ward's leadership, Texas became the first Southern state to ratify the Nineteenth Amendment. "These family heirlooms really bring Chief Justice Ward's leadership to life for me," Judge Elrod said. "I'm glad I could see them."



Former Society President Lynne Liberato with Hortense Ward's silver suffragette cup and Ward's gavel from the All-Woman Court of 1925. Photo by David A. Furlow.



An audience of judges, justices, attorneys, and young people filled the conference hall where the Society's reenactment occurred. Photo by David A. Furlow.

Texas Supreme Court Chief Justice Nathan Hecht presided over the program. "I'd like to thank the Texas Supreme Court Historical Society for bringing this important event in the Court's history to life." Warren Harris thanked the Chief Justice and the reenactors for participating in the program.

Lynne Liberato and David Furlow jointly presented a PowerPoint program that explained how Governor Pat Neff came to appoint this special panel of the Texas Supreme Court. Ms. Liberato provided the case's factual background, telling the audience that the principal legal issue the All-Woman Court addressed was whether the trustees of an early insurance company, the Woodmen of the World, were entitled to own two tracts of land in El Paso. The District Court granted the trustees clear title to only one of the two tracts, she said, so the Woodmen appealed to the Court of Civil Appeals in 1922.

After the Woodmen reversed the district court's judgment in the El Paso Court of Civil Appeals, Ms. Liberato said, the Johnson creditors appealed to the three-man Texas Supreme Court in 1924. The case presented a problem because the insurer, Woodmen of the World, was a fraternal organization and insurance company whose members included all three justices of the Texas Supreme Court.

David Furlow continued the story to show how Governor Pat Neff came to name the All-Woman Court early in 1925. After the three male justices disqualified themselves, Governor Neff, an early proponent of women's rights, appointed three women. But Governor Neff's staff failed to do their homework. Two appointees—Nellie Robertson of Granbury and Edith Wilmans of Dallas—lacked the seven years of legal experience the Texas Constitution required of justices.



From left, Hattie L. Henenberg, Hortense Sparks Ward and Ruth V. Brazzil comprised the "All-Woman Court" of 1925. Photo courtesy of the Texas State Library and Archives.

After Ms. Robertson and Ms. Wilmans withdrew, the Governor appointed Ruth V. Brazzil of Galveston and Hattie L. Henenberg of Dallas. Houstonian Hortense Ward became Special Chief Justice. The women of the All-Woman Court were pioneers. Long before the All-Woman Court convened, Chief Justice Ward led the successful movement to enact Texas's first Married Woman's Property Act and spearheaded the suffrage movement in Texas. Special Justice Henenberg was the first Jewish member of the Texas Supreme Court. Special Justice Brazzil showed that women could play a major role in the insurance industry.



Texas Supreme Court Chief Justice Nathan Hecht opened the program. Photo by David A. Furlow.



Warren Harris described the Society's role in preserving judicial history and pointed out that the *Taming Texas* textbook tells the All-Woman Court's story.



Above and below: David Keltner, standing, and Doug Alexander, seated, portrayed the attorneys who argued *Johnson v. Darr* to the All-Woman Court. All photos by David A. Furlow.





Texas Supreme Court Justice Eva Guzman, left, portrayed Special Justice Hattie Hennenberg. Fifth Circuit Judge Jennifer Elrod, center, played Special Chief Justice Hortense Sparks Ward. Texas Supreme Court Justice Debra Lehrmann appeared as Special Justice Ruth V. Brazzil.

After thanking the Society for making the reenactment possible, Chief Justice Nathan Hecht, portraying Chief Justice Calvin Cureton, swore the three special justices into office. To serve, each had to swear that she had not participated in a duel. Judge Elrod and Justices Guzman and Lehrmann swore the oath. "I was surprised to see that the women had to swear an oath about not participating in a duel," Justice Lehrman later stated. "Much has changed since 1925."

"This Special Panel of the Texas Supreme Court grants the writ and agrees to hear oral argument," Judge Elrod announced in her role as Special Chief Justice Hortense Sparks Ward. "We have read the briefs and are familiar with the arguments and authorities. We will now hear argument from counsel."

David Keltner, appearing in Fort Worth as attorney Volney Brown of the Goggin, Hunter & Brown firm from El Paso, took the podium to argue on behalf of the Woodmen of the World trustees, Plaintiffs J. M. Darr, *et al.* "May it please the Court," he began. "The Court of Civil Appeals' Majority Opinion correctly restates this Court's precedent governing title, trusts, and recordation under the Registration Act. Nothing in the language of the Recordation Act required recordation of the trust, or any recordation allegedly arising out of that trust. As a result, the two tracts of El Paso County land were not subject to the Johnson Creditors' lien."

The special justices, who studied the original briefs in depth and detail, peppered Mr. Keltner with a series of fast-paced questions about the Registration Act, the enforceability of unregistered trusts, and governing precedent.

Basing his analysis on archival copies of briefs filed by attorney J. W. Morrow of the El Paso firm of Neill, Armstrong & Morrow on behalf of Defendants W.F. Johnson *et al.*, reenactor Doug Alexander submitted that the transaction fell squarely within the purview of the Registration Act under the Texas Supreme Court's opinions in *Catlin v. Bennatt* and *Senter v. Lambeth*. The special

panel's justices began another spirited colloquy with counsel based on the original appellate record and issues presented in the parties' 1925 briefs.

In the end, the justices of the 2016 All-Woman Court were no more susceptible to the Johnson Creditors' arguments Mr. Alexander presented than their predecessors had been. Each special justice affirmed the El Paso Court of Civil Appeals' ruling on behalf of the Darr plaintiffs and Woodmen of the World, while each set forth a separate opinion, as in 1925.

"This Court announces its rulings," Judge Elrod announced in her role as Chief Justice Ward, "a holding common to all, as well as a Majority Opinion and two Concurring Opinions. This special panel affirms the Majority Opinion of the Court of Civil Appeals. The Registration Act did not require the Woodmen to record their trust instrument and agreement. Because Vernon's Revised Statutes Article 6824 did not compel recordation to make that trust equitably effective, the Woodmen's two tracts were never subject to the Johnson Creditors' attachment lien."

Justice Debra Lehrmann, in her role as Special Justice Brazzil, announced that, "I concur in the judgment. The decisions of this State are uniform in holding that equitable titles are not affected by the registration statute."

Justice Eva Guzman, portraying Special Justice Hennenberg, announced her concurrence as well. "The trust instrument executed by Jones is not within the terms of the Registration Act. The lien of an attaching creditor does not prevail over it."



Reenactor Doug Alexander hung his head after the special justices ruled in favor of the Woodmen of the World and the Darr plaintiffs. Photo by David A. Furlow.

Reenactor Doug Alexander, who portrayed the El Paso attorney who petitioned for relief in *Johnson v. Darr*, sighed loudly and hung his head after the All-Woman Court ruled in favor of the Woodmen of the World. "I hoped we might change history," he lamented.

Alas, no, Doug. You just don't mess with Texas history.

"I was honored to portray one of these justices," Justice Guzman told the audience after the reenactment. "It's important that we remember the example each of them set."

Justice Lehrmann agreed. "It was a great learning experience. And it was fun."



Left to right, second row: Former Texas Supreme Court Justice Ruby Sondock attended with friends Laura Gibson, Bill Ogden, and James Flodine. Seated in front of them are Texas Tech Law School Dean Darby Dickerson and Fourteenth Court of Appeals Chief Justice Kem Frost. In the foreground at left is Stacy Alexander. Photo by David A. Furlow.

"I love history," Judge Elrod said. "This brought the story of the All-Woman Court to life."

"I thought the program was a great success," Warren Harris added.

The Society's Executive Director, Pat Nester, photographed the reenactment.

After the program, members of the reenactment team attended awards ceremonies, luncheons, and classes in the Fort Worth Convention Center's festive surroundings. The Society would like to extend its special appreciation to Annual Meeting Liaison Susan Brennan, who guided the Society through the process of submitting a proposal and helped find a hall large enough for the large audience that attended the program.



The reenactment took place at the Fort Worth Convention Center, dominated by its large Ten-Gallon Hat Lone Star. Photos by David A. Furlow.



David Furlow and Lynne Liberato bracket the Suffragettes' Loving Cup. Special Chief Justice Hortense Sparks Ward's descendant Linda Hunsaker lent to the Society for the reenactment. Photo by Pat Nester.

Anyone interested in learning more about the All-Woman Court can read several articles published in previous issues of this *Journal*, including one written by Linda Hunsaker, "Family Remembrances and the Legacy of Chief Justice Hortense Sparks Ward," *Texas Supreme Court Historical Society Journal* 4, no. 4 (Summer 2015): 51-64, <http://texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Summer%202015.pdf>.

[Return to Journal Index](#)

DAR Honors Judge Mark Davidson's Preservation of Texas's Courthouse History

By David A. Furlow

Every year, the National Society of the Daughters of the American Revolution (DAR) presents its prestigious Historic Preservation Medal to a person who has rendered extraordinary service over time in establishing a historic district, preserving a local landmark, restoring or preserving objects of historic cultural significance, or establishing or participating in other types of preservation-oriented projects. On March 19, 2016, DAR's Texas State Regent, Judy Ostler, presented that Medal of Honor to a trustee of the Texas Supreme Court Historical Society, Judge Mark Davidson, during DAR's 117th State Conference in Houston.¹



Judge Mark Davidson listens to the announcement of his award. Photo by Sarah Duckers.

DAR's award recognized Judge Davidson's lifelong contributions to the preservation of Texas's unique legal heritage. His devotion to historic preservation began in 1994 when he located records of an 1853 lawsuit in a warehouse without climate control and subject to weather, bugs, rats, and other enemies of history. Those papers, which had been filed by William Marsh Rice, crumbled into confetti as he opened them. Recognizing that Texas's judicial history was at risk, he encouraged Harris County District Clerk Ed Bacarisse to begin a judicial records restoration. Judge Davidson worked closely with Bacarisse, another Harris County hero of judicial history preservation, to solicit law firm, lawyer, and individual-donor funding to create the District Clerk's Historic Documents Room on the second floor of the Harris County Civil Courthouse.

In 2009, Judge Davidson began working with Texas Supreme Court Chief Justice Wallace Jefferson, Baker Botts partner Bill Kroger, and Galveston County District Clerk Latonia Wilson to organize a statewide, twenty-nine-member task force of judges, clerks, lawyers, historians, and archivists to preserve courthouse records in all of Texas's counties.

But first, Judge Davidson took action at the local level. "We wouldn't have the Historic Documents Room and we wouldn't have preserved our oldest documents without the leadership

¹ With over 930,000 members, DAR is now celebrating its 125th anniversary. DAR's Texas State Society began in 1894 and now has 18,549 members in over 200 chapters statewide. See <http://txdar.org/>.



Judge Davidson accepts the DAR's National Historic Preservation Medal of Honor.
Photos by David A. Furlow.

of Charles Bacarisse and Judge Davidson,” Harris County District Clerk Chris Daniels observed. “The Harris County District Clerk’s Office serves as the model for other Texas counties when it comes to preservation of documents.”² District Clerk Daniels’ files hold more than 40,000 pages of judicial records from the Republic of Texas.

Diane E. Teichman, a Harris County courthouse translator and the Chair of the DAR’s Tejas Historical Preservation Committee, works with Judge Davidson to index and access historic documents in the Harris County District Clerk’s Office. Ms. Teichman led efforts to recognize Judge Davidson for his long-term efforts to preserve courthouse records and history. Sarah Davis, Representative of the 134th District in the Texas Legislature, provided the DAR with examples of projects Judge Davidson had initiated in Harris County and beyond. Bill Kroger supported Ms. Teichman’s nomination of Judge Davidson by attesting to his role in discovering and publicizing Houston attorney and later Texas Supreme Court Justice Peter Gray’s “lawsuit for freedom” in the 1848 Harris County District Court case of *Emeline, a Free Woman of Color v. Jesse P. Bolls*.

The Texas Supreme Court Historical Society provided the DAR with examples of Judge Davidson’s scholarship and work with Chief Justice Wallace Jefferson to preserve judicial records statewide. Rebecca Kohout, the Texas State Chair of DAR’s Historic Preservation Committee; Lynn Forney Young, Tejas Chapter member; and Shannon Cranson, DAR’s President General and Tejas Chapter Regent, supported DAR’s award to Judge Davidson.

After receiving the award, Judge Davidson thanked the “many, many people who should be sharing this award with me,” beginning with “Charles Bacarisse and Chris Daniel, the former and current District Clerk of Harris County, who put in yeoman work to preserve and restore their records, and Team Leader of the District Clerk’s Office Records division, Francisco Heredia, the ideal public employee to be the librarian and custodian of our records, since he has a passion for historic documents that is rare indeed.” Judge Davidson expressed gratitude to his

² Chris Daniel, “From the Harris County District Clerk’s Office,” <http://www.hcdistrictclerk.com/Common/forms/pdf/AnnualReport2015.pdf>.



Judge Mark Davidson's Award Dinner Table. Clockwise from bottom left: Kent Adams, Julia Sanders de Berardinis, David A. Furlow, Representative Sarah Davis, Bill Kroger, Elizabeth Kroger, Sarah Duckers, Diane Teichman, Yozi Heredia, and Francisco Heredia. Photo provided by Diane Teichman.



Judge Davidson's wife, Houston probate attorney Sarah Duckers (left), and Diane Teichman, Chair of DAR's Tejas Historical Preservation Committee.

wife, Sarah Duckers, “who puts up with my passion for Texas history and has edited many of my writings, to whom I say thanks and note that her great, great, great, great grandparents, who moved to Texas in 1831, would be very proud of her, and maybe her husband as well.”

Judge Davidson then presented his case for the importance of preserving Texas’s courthouse history:

One of my favorite television shows when I was a teenager began every episode with the voice of William Shatner saying “Space—The Final Frontier.” I have no pretensions that I am charismatic as Captain James T. Kirk or as smart as Mr. Spock, but everyone who is interested in the preservation and study of nineteenth century court records is involved in a mission to explore the last frontier of study of nineteenth and early twentieth century American history.

By this time, virtually all letters from Presidents Washington, Jefferson, and Lincoln have been found and analyzed. In the area of Texas history studies, Sam Houston’s, Stephen F. Austin’s, and Jim Hogg’s writings have been studied and restudied. No historian has attempted to study our history by going to our 254 courthouses and looking at old records. That is a tragedy, since they give a wonderful glimpse into our past.

A lawsuit brought by President Houston against President Lamar in 1838, for example, gives great insight into the relationship between the two, but no biographer of either has ever mentioned the lawsuit. A suit brought by the estate of Stephen F. Austin against President Houston has been lost, however, and the probate file of the Estate of Austin was stolen from the Brazoria County Courthouse.

Records of lawsuits involving the slave trade in Texas are rotting away in dozens of courthouses around the state that may be the only source of genealogy for thousands of Texans today who are the descendants of those slaves.

Records of land title suits in the Rio Grande Valley are the best evidence of how the descendants of Spanish settlers had their land taken, often with court complicity, by the early land barons of South Texas.

This organization has put in, is putting in, and has pledged to continue to put in wonderful work into saving those records and translating them into typewritten computerized form so that today’s scholars can access them and the future generations who apparently will not know how to read cursive will be able to understand them. The DAR’s volunteers are true saviors of our history.

While I accept this award with pride, I thank those who have worked to preserve our history and encourage all of you who love our history to come and see what a treasure trove we have in our public records.

To all of you who share this passion, I can only say, “Live Long and Prosper.” Thank you again, from the bottom of my heart.

A comfortable spring evening ended with expressions of commitment by Diane Teichman and DAR Texas leaders to take Judge Davidson’s mission statewide with support of county-by-county efforts to preserve the history in Texas’s courthouse records.

[Return to Journal Index](#)

Justice Bob Gammage's Son Sworn-In to the Bar

The late Texas Supreme Court Justice Bob Gammage served on the Court from 1991 to 1995, but his impact on Texas law and politics extended far beyond his tenure on the bench. Prior to his election to the Court, he served in both the Texas House and Senate, as well as in the U.S. House of Representatives. Justice Gammage passed away at his home in Llano, Texas in September 2012.

This past spring, Justice Gammage's son, Sam, received the good news that he had passed the Texas bar exam, and needed only to be sworn-in to make his license official. Fittingly, current Justice Don Willett agreed to administer Sam's oath at his father's graveside in the Texas State Cemetery.

Justice Willett was even kind enough to dispense cookies along with the oath!



Sam Gammage. Photo by Justice Don Willett.

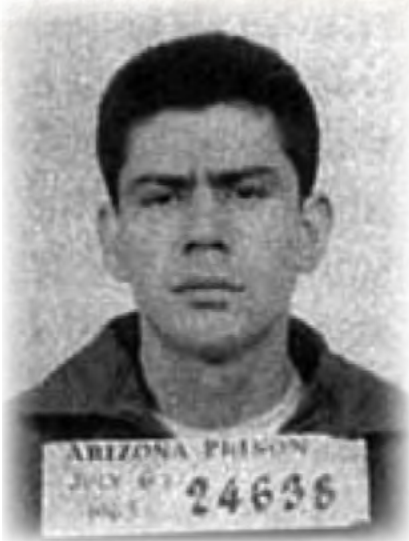
Justice Gammage is buried in the Texas State Cemetery.



[Return to Journal Index](#)

Miranda: More than Words—the Fiftieth Anniversary of the Ruling in *Miranda v. State of Arizona*

By Carmen Roe



Phoenix, Arizona mugshot of Ernesto Miranda.

The words are immediately recognizable to anyone who has watched a police drama—from *Dragnet* to *Miami Vice* to *Law & Order*—over the past half-century:

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to talk to a lawyer and have him present with you while you are being questioned.

If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish.

You can decide at any time to exercise these rights and not answer any questions or make any statements.

Those words play a critical role in modern criminal law.

To commemorate the fiftieth anniversary of the landmark 5-4 U.S. Supreme Court decision in *Miranda v. State of Arizona*, 384 U.S. 436 (1966), a ruling that made these fundamental constitutional protections household words, Harris County Law Librarian Mariann Sears organized a special presentation at the Law Library and online, while the Houston Bar Association presented a live reenactment of the oral arguments before the nation's highest court as part of HBA's 2016 Law Day.¹

Sitting in the historical courthouse at 1901 Fannin, Justices from the First and Fourteenth Courts of Appeals and Harris County District Judges played the roles of the Supreme Court Justices, as a series of narrators traced the story of this seminal decision. From Ernesto Miranda's arrest and interrogation in a Phoenix police station, all the way to the nation's highest tribunal, HBA volunteers retold the story. The program took place on April 29, 2016 at the 1910 Courthouse. Attorneys received one hour of MCLE credit. Admission was free. Houston Bar Association Law Week Committee Co-chairs Daniella D. Landers and Karen Lukin organized the event.



The American Bar Association and the Houston Bar Association memorialized *Miranda's* fiftieth anniversary with this colorful logo.

¹ The Harris County Law Library's *Miranda* webpage can be found at <http://www.harriscountylawlibrary.org/miranda>. Anyone interested in hearing the 1966 oral argument in *Miranda* can find it at <https://www.oyez.org/cases/1965/759>. Anyone interested in reading the decision can do so at <https://www.law.cornell.edu/supremecourt/text/384/436>.



Houston Bar Association Law Day *Miranda* Ruling Display at the Harris County Law Library. Photo provided by Harris County Law Librarian Mariann Sears.



HBA Law Day, left to right: 14th Court of Appeals Justice Martha Hill Jamison, 152nd Judicial District Court Judge Robert Schaffer, 179th Judicial District Court Judge Kristen Guiney, 55th Civil District Judge Jeff Shadwick, 14th Court of Appeals Justice Marc Brown, and First Court of Appeals Senior Justice Terry Jennings. Photo provided by Justice Terry Jennings; photo by Laura M. Flores, HBA.

The pivotal issue before the Supreme Court—one argued ably and forcefully by lawyers for *Miranda*, the State of Arizona, and *amicus curiae*, as portrayed by some of Houston’s legal giants, was whether a citizen who has become the focus of custodial interrogation must be warned of the most basic of all rights afforded to any citizen: the right not to become the instrument of his own conviction. So basic is this right that Article 38.22 of the Texas Code of Criminal Procedure provides even greater protection to Texans than dictated by *Miranda*, requiring that any confession police obtain from a suspect must include a signed waiver acknowledging all rights were provided in writing, or any oral statement must be accompanied by an electronic recording.

While we have taken the protections embodied in *Miranda* for granted for the past fifty years, the Houston Bar Association’s 2016 Law Day event served to remind us that few, if any, Supreme Court decisions are as important to us as *Miranda*. *Miranda* is the ultimate safeguard that ensures that statements to police are the result of a suspect’s free will and not merely the product of coercion, duress, or overreaching.



CARMEN ROE is a criminal defense attorney with the Carmen Roe Law Firm in Houston. She is a past president of the Harris County Criminal Lawyers Association (HCCLA).

[Return to Journal Index](#)

HBA President Gibson Recognizes Teach Texas Committee Leaders



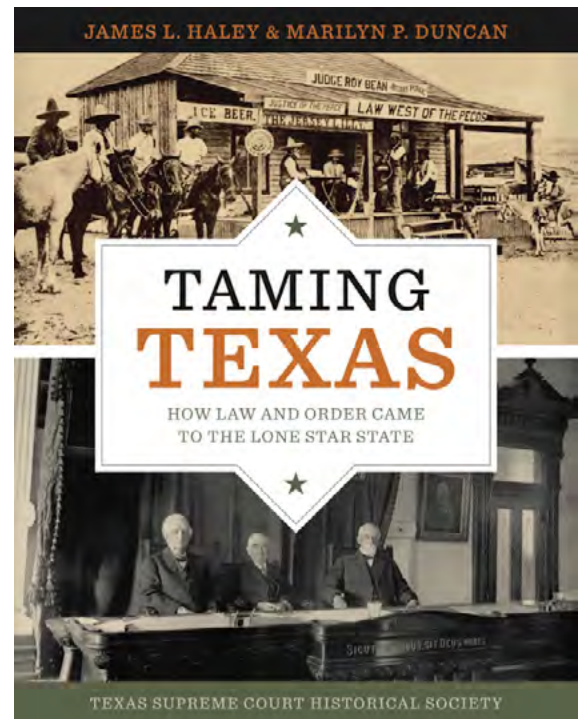
HBA President Laura Gibson presents the HBA President's Award.
Photo by David Furlow.

At the Houston Bar Association's Annual Meeting and Dinner in May, outgoing HBA President Laura Gibson presented the President's Award to the four leaders of the organization's Teach Texas Committee: Fourteenth Court of Appeals Justice Brett Busby, Harris County District Judge Erin Lunceford, David Furlow, and Warren Harris. The HBA Teach Texas Committee implemented the Society's Taming Texas judicial civics and court history project in Houston-area middle schools.

The award recognized the team for leading the successful effort to present the Society's Taming Texas project to Texas history classes in the Houston area between February and May 2016. HBA's Teach Texas Committee led the HBA to become the state's first bar association to pilot the Society's Taming Texas project for seventh-grade students. Volunteer attorneys and judges entered 576 classrooms to teach 9,534 seventh-grade students in 28 schools how law came to the Lone Star State and how today's courts work. The project paves the way for the Society's statewide expansion of the program in the 2016-17 school year.

The Society provided hardback copies of the *Taming Texas* book to middle school history teachers free of charge, while making electronic copies available without charge in e-book formats for Kindle, iBook, and PDF at the Society's *Taming Texas* website: www.tamingtexas.org

The award recognized the team for leading the successful effort to present the Society's Taming Texas project to Texas history classes in the Houston area between February and





Texas Supreme Court Justice Jeff Brown (at podium) and Warren Harris speak to a Teach Texas class.

“The Texas Supreme Court Historical Society and State Bar helped us field a curriculum that informs seventh graders about our courts and the roots of law and order in Texas in an engaging way. I am grateful to our 159 volunteer lawyers and judges, whose enthusiastic teaching allowed us to reach over 400 classes in the Houston area.”

*The Honorable J. Brett Busby
14th Court of Appeals*

“This HBA initiative based on the Texas Supreme Court Historical Society’s beautifully narrated and illustrated Taming Texas judicial civics project taught students how the rule of law came to Texas and showed how the Lone Star State’s courts evolved to offer justice for all.”

*David Furlow
Attorney at Law*

“Since I did not grow up in Texas, but got here as fast as I could, the Teach Texas program not only gave me the opportunity to learn more history of the Lone Star State, but it allowed me to share my love of the Rule of Law and how it developed in Texas!”

*The Honorable Erin Lunceford
61st Civil District Court*

“It was great to be in the classroom to teach students about the courts and our Texas legal system. And it was exciting that we reached almost 10,000 students our first year—thanks to the many judges and lawyers who volunteered to teach.”

*Warren W. Harris
Bracewell LLP*



Award recipients Warren Harris (top left), Judge Erin Lunceford (center), Justice Brett Busby (right), and David Furlow (bottom). Photo by HBA photographer Ariana Ochoa.

Each of the President’s Award recipients expressed gratitude for the inspiration and hard work of Houston Bar Association colleagues, including Executive Director Kay Simm; Director of Projects Bonnie Simmons; Education Director Ashley Gagnon Steininger; Communications Director Tara Shockley; photographer Ariana Ochoa; and the judges, justices, and attorneys who volunteered to participate in Teach Texas Committee programs.

Houston Bar Association President's Awards.



[Return to Journal Index](#)

Houston Bar Receives State Bar's Star of Achievement Award for Teach Texas

By Lynne Liberato



Left to right: HBA President Laura Gibson, State Bar President Allan DuBois, Warren Harris, Justice Brett Busby.

Outgoing Houston Bar Association president Laura Gibson accepted the 2016 Star of Achievement Award for Teach Texas from the State Bar of Texas at its annual meeting in Fort Worth in June. Cosponsored by the Supreme Court Historical Society, Teach Texas places lawyers and judges in middle school classrooms to teach seventh graders about Texas legal history. The Star of Achievement Award recognizes the outstanding bar project of the year.

The program uses the Society's book, *Taming Texas: How Law and Order Came to the Lone Star State*, for its course material. Gauged for young readers, the book was coauthored by James L. Haley and Marilyn P. Duncan. By the time the last lesson was taught for the last school year, almost 200 lawyers and judges visited 29 schools in eight districts teaching 432 classes to 9,400 students.

“What surprised me the most,” explained HBA President Gibson, “was that the program reached a sector of members who had never before volunteered for the Bar. But, once people taught these classes, they were hooked.”

When former Society President Warren Harris approached her with the idea for Teach Texas, she enthusiastically adopted it as one of her signature programs. “Anything Warren is behind will succeed,” is how she characterized her reaction. Plus, she wanted to jumpstart the Houston’s Bar’s tradition of service to schools, which had waned over the years.

Laura recruited Justice Brett Busby, Judge Erin Lunceford, and our editor David Furlow to co-chair the committee for the new project. This year’s award winner was meant to be a pilot program. It is only the beginning.

“We congratulate the Houston Bar on this important award for Teach Texas,” noted 2015–16 Society President Ben Mesches. “Key to the Society’s mission is education of the public about our legal system, and we are grateful to the HBA for partnering with us and for its leadership as we take this program statewide.”

[Return to Journal Index](#)

Barbarians Rising: Interview with David Furlow

By TSCHS Journal Staff



On four Monday nights in June 2016, the History Channel broadcast a new, eight-hour documentary called *Barbarians Rising*. It examined the rise and fall of the Roman Empire from the viewpoint of the “barbarian” peoples who resisted and rebelled against Roman imperialism. The series celebrated such anti-Roman freedom-fighters as Hannibal, Spartacus, Arminius, and Boudica, through dramatic recreations of battles won and lost, dynamic maps, and interviews of experts and contributors who quoted primary records and re-examined well-known legends.

Brian P. Kelly, writing in the *Wall Street Journal*, noted that “the experts interviewed (a diverse bunch that includes academics, military leaders, civil-rights figures and more) are both entertaining and illuminating, framing the barbarian cause, broadly, as a struggle for freedom against an iron-fisted opponent with unparalleled resources.”¹ Among the experts were retired former U.S. Army General Wesley Clark, civil rights leader Rev. Jesse Jackson, Dr. Darius Arya of the American Institute for Roman Culture, and others.

The series also featured extensive film footage of TSCHS Board member and *Journal* Executive Editor David Furlow. David’s interviews appeared in two episodes: the first, on Monday, June 13, to talk about first century A.D. German freedom-fighter Arminius, and on Monday, June 20, to analyze Boudica’s British revolt. Excerpts of David’s “Arminius” analysis can be seen on YouTube at <https://www.youtube.com/watch?v=-UQsSC3seUo> and his Boudica commentary at <https://www.youtube.com/watch?v=9G01vm9MVa4>.

¹ Brian P. Kelly, “*Barbarians Rising* Review: The Other Side of History: The Rise and Fall of the Roman Empire, Told through the Stories of the Men and Women Who Dared to Fight It,” *Wall Street Journal*, June 6, 2016, <http://www.wsj.com/articles/barbarians-rising-review-the-other-side-of-history-1465241572>.

TSCHSJ: *Journal* readers may wonder how you came to appear on a History Channel documentary. What's the story?

DAF: A *Barbarians Rising* producer, Ali Naushahi, contacted me this past January to ask if I'd be interested in working on a new October Film documentary about warrior-queen Boudica's revolt against Nero's Roman Empire. Boudica (pronounced Boó-dee-kah) meant "Victorious Woman," or *Victoria*, in Celtic.

TSCHSJ: So how does someone land a role as a talking-head about Boudica?

DAF: First, Ali asked me to email some things I've published about Boudica's rebellion. Then she watched me on a 2006 documentary, *Warrior Queen Boudica*. She interviewed me on Skype. Finally she asked me if the History Channel could fly me to a studio where I could be interviewed on camera. I said yes.

TSCHSJ: You call this woman Boudica. Is she also known as Boadicea?

DAF: Since Tudor times. Historian Cornelius Tacitus recorded her story, spelling her name Boudicca with two c's and Boudica with one c in *Annals of Rome* and in a biography, *Agricola*. Greek historian Cassius Dio wrote about her in *Epitome of Roman History*. By the time poet Giovanni Boccaccio brought fragments of those histories down from the Monte Cassino monastery to Florence, a thousand years of hand-copying by Dark Age monks had turned Boudica to Boadicea.

TSCHSJ: Should we describe Boudica as "bodacious?"

DAF: Maybe so. British archaeologists uncovered a Roman tombstone two years ago in Gloucestershire inscribed "BODICACIUS." That's close to "bodacious."

TSCHSJ: Before you appeared in 2016's *Barbarians Rising*, you were in an earlier History Channel documentary? How did that come about?

DAF: I was sitting in my office at Thompson & Knight in 2005 when I received a call from a woman named Kim Hawkins who worked for Indigo Films, a History Channel production company making a documentary about Boudica's rebellion.



CNN photo of Gloucestershire "BODICACIA" tombstone.

TSCHSJ: Out of the blue?

DAF: British archaeologists mentioned me, which surprised her because I wasn't teaching in a university and came from Texas. But the archaeologists said I'd visited the dig-sites and had read the Latin histories. So she put me through two tests.

TSCHSJ: How was your test audition?

DAF: It was scary and exhilarating, like making an impromptu oral argument.

TSCHSJ: What did she ask?

DAF: "Tell me about Boudica's rebellion."

TSCHSJ: What did you say?

DAF: Here's pretty much exactly what I said: "In 60 A.D., Boudica's husband, Prasutagus, was a friend and ally of the Roman people who ruled the Iceni, a free people living in what's now East Anglia, England. He was a puppet ruler who defended Rome's frontier from other barbarian peoples. When Prasutagus died, his will left the Emperor Nero half of his wealth while half went to his teenage daughters. But Nero's men plundered the treasury, seized estates, called in loans, and treated the Iceni as a conquered people. When Boudica resisted, Nero's financial officer, Catus Decianus, ordered her stripped and flogged, then told his slaves to rape Prasutagus's two daughters to end resistance. But Boudica and her daughters did not slink into shame and humiliation. They led the Britons into the bloodiest revolt in the island's history."

Kim, the producer, paused and told me I'd passed the first test.

TSCHSJ: What was the second test?

DAF: She asked how I'd explain the rebellion to an American audience.

TSCHSJ: Who might know nothing about Boudica. What did you say?

DAF: It took a minute, then it flowed: "Imagine if the United Nations is a superpower and the United States is under its control. The American President dies, and the UN seizes control of Fort Knox and the White House. The First Lady resists, so the UN's General Secretary orders her stripped and flogged on national TV. And then blue-helmeted UN soldiers rape the President's daughters to terrorize the people. If that happened, Americans would kill every UN soldier in America. And that's what the Britons did in 60 A.D., under Boudica."

The line went silent for a long moment. And I thought, "Well, I just blew it." But then Kim said, "You're hired."

TSCHSJ: How did you answer this producer's questions about the revolt?

DAF: I first heard of Boudica in 1983, while my wife and I studied law in London. We went to the London Dungeon, a scary-house of everything awful in British history. There we saw a wax-museum depiction of a wild-eyed, red-haired Boudica driving a spear through a centurion. That caught my attention. Then I read about how eighty thousand Romans died during the rebellion, and how another eighty thousand Britons died in the final battle in 60 A.D. Lisa and I turned to each other and asked, why is this the first time we've ever heard of this?

TSCHSJ: And that led you to the archaeologists?

DAF: I read every book and archaeological report I could about Boudica. Then I began corresponding with archaeologists, met them, and toured Boudica's battlefields with the curators of the Roman and Celtic galleries at the British Museum. I funded a project to X-ray a British sword from 60 A.D. I went to Britain seven times after 1983 to learn about Boudica's world. I turned vacations into "library and ruins" investigations of Roman Europe, as recently as last week in Bulgaria.

TSCHSJ: Fast-forward to 2016. You appeared in two episodes of *Barbarians Rising*, one to discuss Boudica, the other to describe Boudica's rebellion. Who was Arminius?



Left: David and John Furlow examining Hadrian's Wall in 1992. Right: John Furlow stands next to the reconstructed "Arminius Wall" at the Kalkriese Archaeological Park in Germany. Photos by David Furlow.



Left: Boadicea's stained glass image at the Colchester County Center. Right: British rebels smashed centurion Facilis's tombstone at Camulodunum, now Colchester, during Boudica's rebellion. Photos by David Furlow.

DAF: A German tribesman taken from his family as a hostage, he rose to become an auxiliary cavalry commander in the Roman army. Later he rebelled, organized the Teutoburger Forest ambush that destroyed three Roman legions in 9 A.D., and threw back the Empire's frontier from the Elbe River to the Rhine.

TCHSJ: And how did the History Channel come to call on you to discuss Arminius?

DAF: I'm writing a book about Boudica's rebellion, so I studied all rebellions against Rome. When my older son John had to write an International Baccalaureate paper to graduate from a high school IB program, I took the family to Kalkriese Berg, near Osnabruck, Germany, eighty miles east of the Rhine, where Rome's greatest disaster occurred.

We studied the reconstructed battlefield, saw the Roman skulls and bones, read and reread the history of the revolt. I told Ali, the new producer, about that experience and sent her some of the things I'd written and done. Familiarity with the battleground, years of study and translation-time, and the 2005 *Warrior Queen Boudica* experience won the right to discuss Arminius the liberator of Germania.

TSCHSJ: Roman history is pretty far afield from the *Journal*, isn't it?

DAF: Not as much as you might expect. One reason Arminius led the Germans into rebellion was a Roman governor, Quintilius Varus, imposed Roman law on Germans, who didn't cotton to it. A harsh application of foreign law, high taxes and the seizure of German boys to serve as soldiers resulted in the Battle of the Teutoburger Forest, one of the most decisive battles in the world.

TSCHSJ: Which is where you came in...

DAF: That's precisely what *Barbarians Rising* depicted: the conflict between Arminius's German and Roman identities and how he resolved that by leading the Germans into rebellion against Rome. The "Boudica" episode showed how a will and inheritance dispute led to a bloody rebellion in Britain. If Roman justice had been fair to barbarians, she could have challenged the Emperor's actions. But no barbarian could challenge the Emperor without facing crucifixion, so Arminius and Boudica had to drive the Romans from their lands with fire and steel.

TSCHSJ: You said you had fun, but it took a lot time and effort, didn't it?

DAF: Yes, but it was worth it. Nearly 800,000 people in the U.S. watched the "Arminius" episode, according to ShowBuzzDaily.com, while another 804,000 watched "Boudica." And this summer it's premiering in Europe, Asia, Africa, and Australia. When most people learn what little they know about history from movies and TV, participating in a documentary series is a good way to reach large numbers of people. And what stories. Arminius and Boudica are tales of tyranny, bravery, and the age-old fight for freedom. Those themes resonate today.

TSCHSJ: If someone wants to learn more about Arminius or Boudica but missed seeing the *Barbarians Rising* series in June, what should they do?

DAF: They could watch *Barbarians Rising* on the History Channel or on YouTube, or order the documentary from Amazon.com. Or they could watch the 2006 History Channel documentary *Warrior Queen Boudica*, about 90 minutes long, at <https://www.youtube.com/watch?v=0CEdZ1e2Ag8>. Or they could send me an email at dafurlow@gmail.com and I'll provide a list of books that can be purchased on Amazon.com and information about museums, battlefields, and other places to visit.

[Return to Journal Index](#)

Calendar of Events

Society-related events (highlighted in yellow) and other events of historical interest

Through
September 5, 2016

The Texas General Land Office presents its new exhibition “Mapping Texas: From Frontier to the Lone Star State” at the Witte Museum. The exhibit of over 40 rare maps of Texas can be seen at San Antonio’s Witte Museum Russell Hill Rogers Gallery of the Helen C. and Robert J. Kleberg South Texas Heritage Center, 3801 Broadway St., San Antonio, Texas 78209. <http://www.wittemuseum.org/mapping-texas-from-frontier-to-the-lone-star-state>

Through
September 5, 2016

The Houston Museum of Natural Science’s special exhibition, “La Virgen de Guadalupe: Empress of the Americas” showcases Southwestern history and culture. HMNS, 5555 Hermann Park Dr., Houston, Texas 77030. <http://www.hmns.org/exhibits/special-exhibitions/virgin-of-guadalupe-empress-of-the-americas>

Through
December 31, 2016

The Bryan Museum’s galleries offer artifacts and records from all periods of Texas and Southwestern history. J. P Bryan, a descendant of Moses Austin and a former Texas State Historical Association President, founded this museum at 1315 21st Street, Galveston, Texas 77050, phone (409) 632-7685. Its 70,000 items span 12,000 years. <https://www.thebryanmuseum.org>

Through 2017

The “La Belle: The Ship That Changed History” exhibition re-opens in the Bob Bullock Museum of Texas History’s first floor Texas History Gallery. The hull of the sunken *La Belle* is open for viewing. <http://www.thestoryoftexas.com/la-belle/the-exhibit>

Through
February 15, 2017

The Star of the Republic Museum at Washington-on-the-Brazos focuses on March 1836 with its exhibition “Legacy of Leadership: The Signers of the Texas Declaration of Independence.” The exhibit is at 23200 Park Rd 12, Washington, Texas 77880. <http://www.starmuseum.org/exhibits/#featured>

September 4-5, 2016

28th Annual Advanced Civil Appellate Course and Civil Appellate Practice 101 Course. The Appellate Section of the State Bar of Texas and TexasBarCLE will present the course at the Four Seasons

Hotel in Austin, Texas. <http://www.tex-app.org/DrawOnePage.aspx?PageID=54>

September 9, 2016

The Texas Supreme Court Historical Society holds its Annual John Hemphill Dinner at the Grand Ballroom of the Four Seasons Hotel, 98 San Jacinto Blvd, Austin, Texas 78701, with a 6:30 p.m. general reception and dinner at 7:00 p.m. See the “Hemphill Dinner” news item in this Journal and the dinner information and registration form at <http://www.texascourthistory.org/hemphill>.

September 10, 2016

The Annual Texas Supreme Court BA Breakfast will take place in the Texas Law Center, across from the Supreme Court Building, at 1414 Colorado St., Austin, Texas 78701. Coffee will be available at 8:30 a.m., and breakfast will be served at 9:00 a.m. For more information, see the Society’s website at <http://www.texascourthistory.org/SCOTXbaBreakfast>

September 17, 2016

The Texas General Land Office will conduct its 7th Annual Save Texas History Symposium, “The Alamo: Keystone of Texas History: Past, Present and Future.” This Society-cosponsored event will occur from 8 to 5 p.m. at the historic Menger Hotel at 204 Alamo Plaza, San Antonio, Texas 78205. The Special Reception and VIP Reception will begin at 6:30 p.m. at the Robert J. and Helen C. Kleberg South Texas Heritage Center at the Witte Museum, with buses taking attendees from the Menger Hotel to the Witte Museum. <http://www.glo.texas.gov/save-texas-history/symposium.index.html>

September 22, 2016

Dr. J. F. “Frank” de la Teja, Texas State University Regents’ Professor of History and Director of the Center for the Study of the Southwest, will present copies of his and Manuel González Oropeza’s two-volume treatise, *Acts of the Constituent Congress of Coahuila and Texas, 1824–1827 (Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827)*, to the Texas State Library and Archives and other Texas institutions at the Texas State Library and Archives, 1201 Brazos St., Austin, TX 78701, at 6:30 p.m. A reception will follow.

September 30, 2016

Texas Supreme Court Historical Society historian James L. Haley will present the luncheon program “*Taming Texas: A History of the Texas Courts*” from noon to 1:30 p.m. at the American Academy of Appellate Lawyers Fall Meeting in San Antonio’s Omni La Mansion Hotel. Mr. Haley will discuss the development of Texas law and the introduction of the Society’s textbook in Texas schools. <http://appellateacademy.org/meetings>

Three panelists—Texas Supreme Court Justice Paul Green, Texas Court of Criminal Appeals Judge Elsa R. Alcalá, and Fourth Court of Appeals Chief Justice Sandee Bryan Marion—will discuss the roles of the Texas Supreme Court and the Texas Court of Criminal Appeals in their 1:45-2:30 p.m. program “Implications of a Bifurcated Court of Last Resort.” AAAL Fellow Jane M.N. Webre will serve as moderator. https://www.appellateacademy.org/meeting_fall_2016/program.cfm

October 1, 2016

Texas Supreme Court Chief Justice Nathan L. Hecht and former Chief Justices Wallace B. Jefferson and Thomas R. Phillips will participate in the panel program “Chiefs’ Forum: The Past, Present, and Future of the Supreme Court of Texas” at the American Academy of Appellate Lawyers Fall Meeting (see entry above) from 9 to 10 a.m. AAAL and TSCHS Fellow Warren Harris will moderate. https://www.appellateacademy.org/meeting_fall_2016/program.cfm

Chief Justice Nathan L. Hecht, AAAL Fellow Nina Cortell, and attorney Lisa Bowlin Hobbs will participate in the panel program “The Collaboration of the Bench and the Bar in the Rulemaking Process” from 10 to 10:45 a.m. https://www.appellateacademy.org/meeting_fall_2016/program.cfm

September 30, 2016 –
January 2, 2017

The Bob Bullock Texas State History Museum in Austin hosts the exhibition, “American Flags” from September 30, 2016 through January 2, 2017. Flags, art, and memorabilia are at the Museum, 1800 Congress Avenue, Austin, Texas 78701, (512) 936-8746. <http://www.thestoryoftexas.com/visit/exhibits/american-flags>

October 5, 2016

The Texas State Historical Association (TSHA) *Exploring Texas Workshop* will focus on teaching Texas history from 1682 to the present at the Region 19 Education Service Center in El Paso, Texas. <https://tshaonline.org/education/teachers/exploringtexas>

October 20, 2016

The Texas Supreme Court Historical Society will hold its Fall 2016 Board of Trustees Meeting from 10 a.m. to 1 p.m. in the Hatton W. Sumners Room on the First Floor of the State Bar’s Texas Law Center. Alicia (“Ali”) James, Texas State Preservation Board Director, will present a colorful PowerPoint history of the Texas Capitol Complex, including the history of the Texas Supreme Court.

October 28-30, 2016

The Texas State Genealogical Society conference will occur at the Crowne Plaza Dallas Downtown. <http://www.txsgs.org/conference>

November 3, 2016

The San Jacinto Museum of History will honor Gene Kranz, former Flight Director, NASA, and Director of NASA Mission Operations at a Special Night of Texas History. One Monument Circle La Porte (Houston), Texas 77571-9585. http://www.sanjacinto-museum.org/About_Us/News_and_Events/Upcoming_Events/Special_Evening_with_Texas_History_2016

November 5, 2016

Father of Texas Day at San Felipe de Austin. 15945 FM 1458, west of Sealy on I-10. All-day activities and programming with hands-on activities for children and families as well as structured tour/program offerings. <http://www.thc.texas.gov/news-events/events/father-texas-celebration>

November 5-6, 2016

Texas Book Festival in Austin. <http://www.texasbookfestival.org>

November 14-15, 2016

The Texas State Historical Association (TSHA) *Energizing Texas History Workshop* will focus on teaching Texas history from 1836 to 1900 at the Old Red Museum, Dallas, Texas. <https://tshaonline.org/education/teachers/exploringtexas>

February 6-7, 2017

The Texas State Historical Association (TSHA) *Energizing Texas History Workshop* will focus on teaching Texas history from 1900 to 2016 at the Thompson Conference Center in Austin on February 6 and at the Bullock Texas State History Museum in Austin on February 7. <https://tshaonline.org/education/teachers/exploringtexas>

[Return to Journal Index](#)



THE TEXAS SUPREME COURT HISTORICAL SOCIETY

2016-2017 OFFICERS

PRESIDENT

Ms. Macey Reasoner Stokes

PRESIDENT-ELECT

Hon. Dale Wainwright, Justice (Ret.)

VICE-PRESIDENT

Ms. Marcy Hogan Greer

TREASURER

Mr. Dylan D. Drummond

SECRETARY

Ms. Cynthia K. Timms

IMMEDIATE PAST PRESIDENT

Mr. Ben L. Mesches

CHAIR EMERITUS

Hon. Jack Pope, Chief Justice (Ret.)

TEXAS SUPREME COURT HISTORICAL SOCIETY

P.O. Box 12673

Austin, Texas 78711-2673

Phone: 512-481-1840

Email: tschs@sbcglobal.net

Web: www.texascourthistory.org

Executive Director

Patrick A. Nester

Administrative Coordinator

Mary Sue Miller

Consulting Editor

Marilyn P. Duncan

BOARD OF TRUSTEES

Mr. Robert A. Black

Hon. Jeff Brown, Justice

Mr. William J. Chriss

Mr. Josiah M. Daniel III

Hon. Mark D. Davidson

Hon. Craig Enoch, Justice (Ret.)

Mr. David A. Furlow

Mr. Robert B. Gilbreath

Mr. Warren W. Harris

Mr. James C. Ho

Mr. Clyde J. Jackson

Hon. Wallace B. Jefferson, Chief Justice
(Ret.)

Mr. David F. Johnson

Mr. Peter M. Kelly

Hon. David Keltner

Hon. Elizabeth Lang-Miers

Mr. Thomas S. Leatherbury

Ms. Lynne Liberato

Mr. Christopher W. Martin

Hon. Ann Crawford McClure

Hon. Harriet O'Neill, Justice (Ret.)

Mr. William W. Ogden

Mr. Richard R. Orsinger

Ms. Constance H. Pfeiffer

Mr. Richard B. Phillips, Jr.

Hon. Thomas R. Phillips, Chief Justice
(Ret.)

Hon. Rick Strange

Hon. Sue S. Walker

Hon. Ken Wise

Mr. R. Paul Yetter

Mr. Evan A. Young

COURT LIAISON

Hon. Paul W. Green, Justice
Supreme Court of Texas

JOURNAL STAFF

General Editor

Lynne Liberato

lynne.liberato@haynesboone.com

Executive Editor

David A. Furlow

dafurlow@gmail.com

Deputy Executive Editor

Dylan O. Drummond

dylan.drummond@squirepb.com

Managing Editor

Marilyn P. Duncan

mpduncan@austin.rr.com

Production Manager

David C. Kroll

dckroll@gmail.com

DISCLAIMER

The Texas Supreme Court Historical Society (the "Society") is a nonprofit, nonpartisan, charitable, and educational corporation. The Society chronicles the history of the Texas Supreme Court, the Texas judiciary, and Texas law, while preserving and protecting judicial records and significant artifacts that reflect that history.

The *Journal of the Texas Supreme Court Historical Society* welcomes submissions, but the Editorial Board reserves the right to determine what will be published in every issue. The Board does not discriminate based on viewpoint, but does require that an article be scholarly and interesting to the *Journal's* readership. The *Journal* includes content concerning activities of public figures, including elected judges and justices, but that chronicling should never be construed as an endorsement of a candidate, a party to whom a candidate belongs, or an election initiative. Publication of an article or other item is neither the Society's nor the *Journal's* endorsement of the views expressed therein.

[Return to Journal Index](#)

2016-17 New Member List

The Society has added five new members since June 1, 2016,
the beginning of the new membership year.

TRUSTEE

Clyde J. "Jay" Jackson
Richard B. "Rich" Phillips, Jr.

CONTRIBUTING

John G. Browning

REGULAR

Barbara Radnofsky
Kenna Seiler

[Return to Journal Index](#)

Membership Benefits & Application

Hemphill Fellow \$5,000

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow \$2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of Society Publications
- Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- Recognition in All Issues of *Quarterly Journal of the Texas Supreme Court Historical Society*
- All Benefits of Trustee Membership

Trustee Membership \$1,000

- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- Complimentary Admission to Society's Symposium
- All Benefits of Regular Membership

Patron Membership \$500

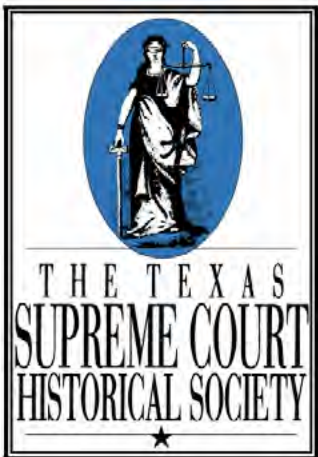
- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Contributing Membership \$100

- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Regular Membership \$50

- Receive *Quarterly Journal of the Texas Supreme Court Historical Society*
- Receive Quarterly Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs



Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education. Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, education outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

Member benefits increase with each membership level. Annual dues are tax deductible to the fullest extent allowed by law.

Join online at <http://www.texascourthistory.org/Membership>

Name _____

Firm/Court _____

Building _____

Address _____ Suite _____

City _____ State _____ Zip _____

Phone (____) _____

Email (required for eJournal delivery) _____

Please select an annual membership level:

- | | |
|---|---|
| <input type="checkbox"/> Trustee \$1,000 | <input type="checkbox"/> Hemphill Fellow \$5,000 |
| <input type="checkbox"/> Patron \$500 | <input type="checkbox"/> Greenhill Fellow \$2,500 |
| <input type="checkbox"/> Contributing \$100 | |
| <input type="checkbox"/> Regular \$50 | |

Payment options:

- Check enclosed, payable to **Texas Supreme Court Historical Society**
- Credit card (see below)
- Bill me

Amount: \$ _____

Credit Card Type: Visa MasterCard American Express Discover

Credit Card No. _____ Expiration Date _____ CSV code _____

Cardholder Signature _____

Please return this form with your check or credit card information to:

Texas Supreme Court Historical Society
P. O. Box 12673
Austin, Tx 78711-2673

eJnl appl 8/16